No.

In the Supreme Court of the United States

FNU TANZIN, ET AL., PETITIONERS

v.

MUHAMMAD TANVIR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, permits suits seeking money damages against individual federal employees.

PARTIES TO THE PROCEEDING

Petitioners were the appellees in the court of appeals. They are FNU Tanzin, Sanya Garcia, John LNU, Francisco Artusa, John C. Harley III, Steven LNU, Michael LNU, and Gregg Grossoehmig, Special Agents of the Federal Bureau of Investigation (FBI); Weysan Dun, Special Agent in Charge, FBI; James C. Langenberg, Assistant Special Agent in Charge, FBI; and five John Doe Special Agents, FBI.*

Respondents were the appellants in the court of appeals. They are Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Tanvir v. *Lynch*, No. 13-cv-6951 (Feb. 17, 2016)

United States Court of Appeals (2d Cir.):

Tanvir v. *Tanzin*, No. 16-1176 (May 2, 2018), petition for reh'g denied, Feb. 14, 2019.

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* As specified above, the pleadings named several defendants as First Name Unknown (FNU), Last Name Unknown (LNU), or anonymously as John Does. D. Ct. Doc. 15, at 1, 8-9 (Apr. 22, 2014). The pleadings list six John Doe Special Agents of the FBI, but John Does 2 and 3 have been determined to be the same person. App., *infra*, 64a n.1. Nine other named or unnamed Special Agents, as well as the Attorney General, the Director of the FBI, the Director of the Terrorist Screening Center, and the Secretary of Homeland Security were defendants in the district court but did not appear in the court of appeals. Awais Sajjad was a plaintiff in the district court but did not appear in the court of appeals. See *id.* at 1a, 62a.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the petitioners in this case, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) is reported at 894 F.3d 449. The order denying rehearing en banc, along with concurring and dissenting opinions (App., *infra*, 45a-61a), is reported at 915 F.3d 898. The opinion of the district court (App., *infra*, 62a-109a) is reported at 128 F. Supp. 3d 756.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2018. A petition for rehearing was denied on February 14, 2019 (App., *infra*, 45a-46a). On May 8, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including

June 14, 2019. On June 4, 2019, Justice Ginsburg further extended the time to and including July 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 2000bb-1(c) provides:

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. 2000bb-2(1) provides:

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.

Other relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 115a-118a.

STATEMENT

This case concerns the scope of the remedy Congress provided in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, to those whose exercise of religion has been substantially burdened by the government. The question presented is whether the provision in RFRA allowing litigants to "obtain appropriate relief against a government," 42 U.S.C. 2000bb-1(c), authorizes an award of money damages against federal employees sued in their individual capacities. The answer to that question raises fundamental separation-of-powers concerns with a significant impact on Executive

Branch operations nationwide, warranting this Court's review.

1. Congress enacted RFRA in response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the First Amendment does not require neutral and generally applicable laws that substantially burden religious exercise to be justified by a compelling government interest. See 42 U.S.C. 2000bb(a)(4). Congress declared that RFRA's purposes were "to restore the compelling interest test" that had been used before *Smith* and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. 2000bb(b)(1) and (2); cf. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

RFRA accordingly provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless that burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). And RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c). The Act defines "government" to "include[] a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States" or other federal possessions. 42 U.S.C. 2000bb-2(1). RFRA does not define "appropriate relief."

2. Respondents are Muslim men who lawfully immigrated to the United States and are now either U.S. citizens or lawful permanent residents. App., *infra*, 3a. They allege that several agents of the Federal Bureau of Investigation (FBI) asked them to serve as informants for the government in terrorism-related investigations, but they refused, at least in part based on their religious beliefs. Respondents assert that petitioners then retaliated against them by improperly using the No Fly List—a government-maintained list of persons known or suspected of posing a risk of terrorism and therefore not permitted to board commercial aircraft in the United States. *Id.* at 3a-4a. In particular, respondents allege that the agents placed (or, if a respondent was already on the No Fly List, retained) them on the No Fly List due to their decision not to assist the FBI. *Ibid.* Thus, according to respondents, the agents forced them "into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to * * * placement or retention on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid [placement or retention] on the No Fly List," and in that way substantially burdened their exercise of sincerely held religious beliefs. *Id.* at 4a. Respondents acknowledge, however, that only relevant agencies, and not individual FBI agents, have the authority to determine the composition of the No Fly List. See *id.* at 5a.

Respondents sued and, among other things, asserted violations of their rights under RFRA and the First Amendment, for which they sought a remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App., *infra*, 11a; see *id.* at 12a. They sought both injunctive relief against

the defendants in their official capacities, as well as damages in their individual capacities.

The district court stayed the official-capacity claims after the government advised respondents "that it knew of 'no reason' why they would be unable to fly in the future." App., *infra*, 64a. The district court then dismissed the individual-capacity claims. *Ibid.*

First, the district court held that a *Bivens* remedy is not available for a violation of the First Amendment. App., *infra*, 79a-94a; see *Turkmen* v. *Hasty*, 789 F.3d 218, 236 (2d Cir. 2015), rev'd in part and vacated in part on other grounds *sub nom. Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017). Respondents did not appeal that determination.

Second, the district court dismissed respondents' RFRA claims for damages against the individual FBI agents. App., *infra*, 94a-108a. The court noted that, in *Sossamon* v. *Texas*, 563 U.S. 277 (2011), this Court held that identical language in RFRA's companion statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, does not authorize money damages against a State. App., *infra*, 94a-95a. The district court then looked to Congress's purposes, determining that Congress designed RFRA "to restore the compelling interest test" for religious-exercise claims as it had existed before *Smith*. *Id.* at 97a (quoting 42 U.S.C. 2000bb(b)(1)); see *id.* at 98a. The court observed that this Court had never recognized a First Amendment claim for damages against individual federal officials before or after *Smith*. *Id.* at 101a-102a. And RFRA itself "says very little about remedies," making it "unlikely that Congress intended it to displace the existing remedial system for constitutional violations." *Id.* at 101a (quoting *Mack* v. *O'Leary*, 80 F.3d 1175, 1181 (7th Cir. 1996), vacated on other grounds,

522 U.S. 801 (1997)). Thus, the court concluded, "the plain language of the statute read in the light of its stated purpose suggests the law changed the standard applicable to free exercise claims while retaining all remedies that were understood as 'appropriate' for claims under the Free Exercise Clause—and nothing more." *Id.* at 101a-102a; see *id.* at 107a-108a.

Respondents dismissed their official-capacity claims, and the district court entered final judgment in favor of petitioners. See App., *infra*, 112a-114a.

3. The court of appeals reversed the dismissal of respondents' individual-capacity claims for damages, and remanded for consideration of petitioners' qualified-immunity defense. App., *infra*, 1a-44a.

The court of appeals first concluded that RFRA authorizes individual-capacity claims against federal officers. App., *infra*, 15a-22a. RFRA allows an aggrieved person to "obtain appropriate relief against a government," 42 U.S.C. 2000bb-1(c), and defines "government" to include an official or "other person acting under color of law," 42 U.S.C. 2000bb-2(1). The court of appeals substituted RFRA's definition of "government" into the text authorizing suit, determining that "RFRA, by its plain terms, [thus] authorizes individual capacity suits against federal officers." App., *infra*, 19a.

The court of appeals next determined that the phrase "appropriate relief" includes money damages against individual defendants. The court acknowledged the phrase is ambiguous, as this Court recognized in *Sossamon* when interpreting the same statutory text in RLUIPA. App., *infra*, 23a-24a. The court of appeals observed that Congress enacted RFRA one year after *Franklin* v. *Gwinnett County Public Schools*, 503 U.S.

60 (1992), which states that courts ordinarily "presume[] the availability of all appropriate remedies unless Congress has expressly indicated otherwise." App., *infra*, 24a-25a (quoting *Franklin*, 503 U.S. at 66) (emphasis omitted). The court of appeals concluded that Congress's use of the phrase "appropriate relief" in RFRA indicated that it intended to follow *Franklin* and thus to make damages presumptively available. *Id.* at 25a-26a.

Although *Sossamon* held that the same phrase in RLUIPA does not include damages against a State, and other circuits have held that RFRA does not allow damages against the federal government, the court of appeals distinguished those rulings on the ground that they were based on considerations of sovereign immunity that do not pertain to individual-capacity suits. App., *infra*, 26a-28a. The court also distinguished its own circuit precedent holding that RLUIPA does not permit individual-capacity damages suits against state officers. *Id.* at 28a-30a; see *Washington* v. *Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013) (per curiam). The court explained that *Gonyea* rested on the principle that, in Spending Clause legislation like RLUIPA, Congress may impose conditions on States that accept the relevant funds, but not on individuals (like the State's employees) who did not themselves receive the funds. Because RFRA did not rest on the Spending Clause, the panel reasoned, that concern is not implicated. App., *infra*, 29a-30a. The court recognized that under its holding, "appropriate relief" would include damages against individual officials who violate RFRA, but *not* individual officials under RLUIPA, sovereigns under RFRA, or sovereigns under RLUIPA. See *id.* at 31a. But the court concluded

the word "appropriate" "may well take on different meanings in different settings." *Ibid.*

4. Petitioners sought rehearing en banc, which was denied. App., *infra*, 45a-46a. Chief Judge Katzmann and Judge Pooler, both members of the panel, concurred in the denial of rehearing en banc. *Id.* at 47a-50a.[1] Judge Jacobs filed an opinion dissenting from the denial of rehearing en banc, which was joined by Judges Cabranes and Sullivan. *Id.* at 51a-58a. Judge Cabranes also filed a dissenting opinion, which was joined by Judges Jacobs and Sullivan. *Id.* at 59a-61a.

a. In their concurring opinion, Chief Judge Katzmann and Judge Pooler reaffirmed their view that the panel decision properly interpreted RFRA to provide a damages remedy where Congress "legislated liability," and, contrary to the dissenting judges' opinions, was not akin to implying a new *Bivens*-type cause of action. App., *infra*, 49a; see *id.* at 47a-50a.

b. In his dissent, Judge Jacobs explained that the panel's reasoning "fails as a matter of law and logic and runs counter to clear Supreme Court guidance," and its conclusion "could be viewed without alarm only by people (judges and law clerks) who enjoy absolute immunity" from damages suits. App., *infra*, 51a. Judge Jacobs emphasized that this Court and the Second Circuit had previously interpreted the "identical private right of action" in RLUIPA not to allow damages suits against a state or an individual, respectively. *Id.* at 52a. The dissent observed that this Court's holding in *Sossamon* relied on "the plain meaning of the text": "appropriate relief against a government" suggests that since both

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[1] The third panel member was Judge Lynch, who as a senior judge could not report his views on the petition for rehearing en banc. See App., *infra*, 47a n.1.

RFRA and RLUIPA authorize actions against a sovereign, "'monetary damages are not suitable or proper.'" *Id.* at 52a-53a (quoting *Sossamon*, 563 U.S. at 286) (internal quotation marks omitted). Judge Jacobs found it implausible that, since RFRA and RLUIPA "attack the same wrong, in the same way, in the same words," the "appropriate relief against a government" can mean one thing in RFRA and another in RLUIPA. *Id.* at 53a.

That RFRA's definition of "government" includes an "official," Judge Jacobs wrote, does not suggest personal liability, but simply "facilitate[s] injunctive relief" and "tells us nothing about damages." App., *infra*, 53a. Judge Jacobs also contrasted the language of RFRA with that in 42 U.S.C. 1983, which permits an "action at law" and thus plainly allows damages suits. App., *infra*, 54a (quoting 42 U.S.C. 1983); see *id.* at 53a-54a. Judge Jacobs further observed that "'every other federal statute'" respondents identified allowing damages actions against individual federal officers does so expressly, *id.* at 54a (quoting *id.* at 103a), thus underscoring that "[i]f a statute imposes personal damages liability against individual federal officers, one would expect that to be done explicitly, rather than by indirection, hint, or negative pregnant," *id.* at 55a. Judge Jacobs explained that the lack of a damages remedy was supported by RFRA's purpose, which was to restore the pre-*Smith* substantive protection for religion rather than to expand the kinds of relief available before *Smith*. *Id.* at 55a-56a.

Judge Jacobs also distinguished *Franklin*, which he explained did not create a presumption of money damages, but simply recognized a presumption of "appropriate" remedies for private rights of action, which "simply begs the question" of what "appropriate" remedies RFRA allows. App., *infra*, 56a. In construing

what remedies are "appropriate," he instead looked to cases like *Ziglar* v. *Abbasi*, 137 S. Ct. 1843 (2017), in which this Court observed that damages are not "generally considered appropriate relief against governments and government officials." App., *infra*, 56a. *Franklin* also concerned an implied right of action, Judge Jacobs wrote, which are "not in vogue." *Id.* at 57a. Yet "[t]he panel has done what the Supreme Court has forbidden: it has created a new *Bivens* cause of action, albeit by another name and by other means. The Supreme Court did not shut the *Bivens* door so that we could climb in a window." *Ibid.* Judge Jacobs further noted that the panel opinion disregarded the "'substantial social costs'" that inhere in individual damages liability for public officials, and will result in "federal policy being made (or frozen) by the prospect of impact litigation," creating incentives to "avoid doing one's job." *Id.* at 57a-58a (citation omitted). Thus, he concluded, "the panel opinion is quite wrong and actually dangerous." *Id.* at 58a.

c. In his dissent, Judge Cabranes criticized the panel decision as "a transparent attempt to evade, if not defy," this Court's precedents admonishing against the extension of *Bivens*-like remedies. App., *infra*, 59a. Judge Cabranes observed that, in *Abbasi* and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this Court had made clear that "damages remedies against government officials are disfavored and should not be recognized absent explicit congressional authorization" because of the "'substantial costs'" they impose. App., *infra*, 60a (quoting *Abbasi*, 137 S. Ct. at 1856). He thus determined that Congress had not "legislated a *Bivens*-like remedy—*sub silentio*—in enacting RFRA." *Ibid.*

REASONS FOR GRANTING THE PETITION

When Congress has enacted statutes like 42 U.S.C. 1983 that create an express cause of action that provides for damages against individual officials, it has clearly considered that important step and spoken in unambiguous terms. In RFRA, by contrast, Congress merely provided that a person may sue for "appropriate relief against a government," which is defined to include an "official." 42 U.S.C. 2000bb-1(c), 2000bb-2(1). This Court has already held that the very same phrase in RFRA's sister statute, RLUIPA, does not speak clearly enough to authorize damages actions against a State. See *Sossamon* v. *Texas*, 563 U.S. 277 (2011). The courts of appeals have further concluded that RLUIPA does not authorize damages actions against individual state officers and that RFRA does not authorize damages actions against the federal government itself. The court of appeals here, however, erroneously construed RFRA to expose federal officers to personal liability for money damages, so individual federal officers stand alone in facing financial liability for religious-exercise claims.

The court of appeals' anomalous ruling clears the way for a slew of future suits against national-security officials, criminal investigators, correctional officers, and countless other federal employees, seeking to hold them personally liable for alleged burdens on any of the myriad religious practices engaged in by the people of our Nation. That ruling thus creates significant practical problems both for individual federal employees and the Executive Branch more broadly. Accordingly, although no circuit conflict exists on the question presented, this Court's review is warranted.

A. RFRA Does Not Provide An Action For Damages Against Individual Federal Officials

RFRA's text, read in light of its context, history, purpose, and this Court's interpretation of RLUIPA in *Sossamon*, is best understood not to provide an action for damages against individual federal officials.

1. RFRA provides that an individual may "obtain appropriate relief against a government" for violating RFRA, 42 U.S.C. 2000bb-1(c), and it defines "government" to include a federal "official," 42 U.S.C. 2000bb-2(1). Congress thereby made available injunctive relief that runs against a federal officer in his official capacity; it did not make available damages against the officer in his personal capacity. Damages against an individual official are not "appropriate relief *against a government*," 42 U.S.C. 2000bb-1(c) (emphasis added), in any ordinary sense of that phrase, because they do not come out of the federal treasury, unless the government makes the independent discretionary decision to indemnify the official for his or her losses. See *Sossamon*, 563 U.S. at 286 ("Far from clearly identifying money damages, the word 'appropriate' is inherently context dependent."); see also *Webster's Third New International Dictionary* 106 (1993) (defining "appropriate" as "specially suitable: FIT, PROPER").

At the least, RFRA is not sufficiently clear that an award of damages against individual federal officials is "appropriate relief against a government," 42 U.S.C. 2000bb-1(c), in light of the serious separation-of-powers concerns with imposing personal monetary liability on federal executive officers. As Judge Cabranes explained in his dissent from the denial of rehearing en banc, this Court's precedents instruct that "damages remedies against government officials are disfavored

and should not be recognized absent explicit congressional authorization" because of the "'substantial costs'" they impose. App., *infra*, 60a (citation omitted); see *id.* at 55a (Jacobs, J., dissenting from the denial of reh'g en banc) ("If a statute imposes personal damages liability against individual federal officers, one would expect that to be done explicitly."). This Court has emphasized, both in cases involving statutory remedies as well as in actions under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that it is typically the role of Congress, not the courts, to "decide whether to provide for a damages remedy" against individual federal officers. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) (citation and internal quotation marks omitted); cf. *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) ("[A]bsent further action from Congress it would be inappropriate for courts to extend * * * liability to foreign corporations" under the Alien Tort Statute, 28 U.S.C. 1350).

Creating a damages remedy against individual federal employees "requires an assessment of its impact on governmental operations systemwide." *Abbasi*, 137 S. Ct. at 1858. That impact is significant: Damages suits impose "burdens on Government employees who are sued personally," preventing them from "devoting the time and effort required for the proper discharge of their duties" and causing them to "second-guess difficult but necessary decisions" in matters constitutionally committed to the Executive Branch. *Id.* at 1858, 1860-1861; see *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987) ("substantial social costs"); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (costs include "expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of

public office," as well as "'dampen[ing] the ardor of [officials] in the unflinching discharge of their duties'" (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.), cert. denied, 339 U.S. 949 (1950))). Damages remedies against individual officials also impose "costs and consequences to the Government itself," through impairment of policy-making, intrusion on "sensitive functions of the Executive Branch," and putting the government to the choice of whether to "defen[d] and indemnif[y]" the individual official. *Abbasi*, 137 S. Ct. at 1856, 1858, 1861.

Congress is "in the better position" to weigh those factors and to "consider if 'the public interest would be served'" by imposing a damages remedy on federal employees. *Abbasi*, 137 S. Ct. at 1857 (quoting *Schweiker* v. *Chilicky,* 487 U.S. 412, 427 (1988)) (internal quotation marks omitted). Thus, "no matter how desirable [a remedy] might be as a policy matter, or how compatible with the statute" or its purposes, courts should not create that remedy unless Congress "displays an intent" to allow it. *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001); see *Abbasi*, 137 S. Ct. at 1856 (Congress "has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government."); *Wilkie* v. *Robbins*, 551 U.S. 537, 562 (2007) ("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf.") (citation omitted). Here, the amorphous phrase "appropriate relief" does not indicate that Congress has actually decided to make individual officers liable for money damages. If anything, it suggests that Congress declined to answer any question about which

kinds of remedies are available, and instead left that question for the courts to resolve under preexisting principles of law.

2. RFRA's language stands in contrast to that of statutes where Congress has expressly created a private cause of action and allowed for an award of damages against individual government employees. Most prominently, Section 1983 provides that "[e]very person" acting under color of state law who deprives another of federal rights "shall be liable to the party injured in an action at law." 42 U.S.C. 1983. The reference to liability "at law" leaves no doubt Congress intended to allow for a damages suit. See *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974) (damages are "the traditional form of relief offered in the courts of law"). And as the district court observed, "every other federal statute identified by [respondents] as recognizing a personal capacity damages action against federal officers * * * includes specific reference to the availability of damages." App., *infra*, 103a; see, *e.g.*, 18 U.S.C. 2520(b) ("appropriate relief includes * * * damages * * * and punitive damages"); 42 U.S.C. 1985 ("action for the recovery of damages"); 50 U.S.C. 1809-1810 ("aggrieved person * * * entitled to recover" from person acting "under color of law" "actual damages * * * liquidated damages [and] * * * punitive damages").

When Congress has created an express cause of action that provides for damages against individual officers, it has thus consistently taken that significant step consciously, conveying its intent in unequivocal terms. RFRA, by contrast, does not mention "liability" or "damages," nor does it refer to an action "at law" or even to a "remedy." RFRA instead simply provides for "appropriate relief against a government," 42 U.S.C.

2000bb-1(c), to include an "official," 42 U.S.C. 2000bb-2(1), suggesting that, unlike in Section 1983, Congress did not intend for individual officials to be liable for damages under RFRA.[2]

3. This Court has already held in *Sossamon* that the very same phrase "appropriate relief against a government" in RLUIPA—RFRA's "sister statute," *Holt* v. *Hobbs*, 135 S. Ct. 853, 859 (2015)—does not provide for an award of damages against a State. In RLUIPA, Congress relied on its powers under the Spending Clause to allow state prisoners and certain other claimants "to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Id.* at 860 (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). RLUIPA's remedial language is materially identical to RFRA's: A person may "obtain appropriate relief against a government," 42 U.S.C. 2000cc-2(a), and "government" is defined to include an "official." 42 U.S.C. 2000cc-5(4)(A)(ii). Faced with this language in *Sossamon*, this Court held that damages were *not* "appropriate relief" against a State. 563 U.S. at 288. The Court explained that Congress must "give[] clear direction that it intends to include a damages remedy" against a State for one to be available. *Id.* at 289 (emphasis omitted).

Every court of appeals to consider the question has similarly concluded that RLUIPA does not permit a

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[2] RFRA echoes Section 1983 in the limited respect that it applies to an "official (or other person acting under color of law)." 42 U.S.C. 2000bb-2(1). But that phrase "tells us nothing about damages" because it is needed to facilitate injunctive and declaratory relief against federal officials and private parties (such as operators of a privately operated prison) acting under color of federal law. App., *infra*, 53a (Jacobs., J., dissenting from the denial of reh'g en banc).

damages remedy against a state employee sued in an individual capacity. *E.g.*, *Washington* v. *Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013) (per curiam); *Sharp* v. *Johnson*, 669 F.3d 144, 153-155 (3d Cir.), cert. denied, 567 U.S. 937 (2012); *Rendelman* v. *Rouse*, 569 F.3d 182, 188-189 (4th Cir. 2009); *Sossamon* v. *Lone Star State of Tex.*, 560 F.3d 316, 328-329 (5th Cir. 2009), aff'd, 563 U.S. 277 (2011); *Haight* v. *Thompson*, 763 F.3d 554, 567-570 (6th Cir. 2014); *Nelson* v. *Miller*, 570 F.3d 868, 886-889 (7th Cir. 2009); *Stewart* v. *Beach*, 701 F.3d 1322, 1333-1335 (10th Cir. 2012); *Smith* v. *Allen*, 502 F.3d 1255, 1271-1275 (11th Cir. 2007), abrogated on other grounds by *Sossamon* v. *Texas*, 563 U.S. 277 (2011). The courts of appeals have also been unanimous in concluding that in cases against the federal government, "RFRA's reference to 'appropriate relief' [does not] include[] monetary damages." *Webman* v. *Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006); accord *Davila* v. *Gladden*, 777 F.3d 1198, 1210 (11th Cir.), cert. denied, 136 S. Ct. 78 (2015); *Oklevueha Native Am. Church of Haw., Inc.* v. *Holder*, 676 F.3d 829, 840-841 (9th Cir. 2012).

The phrase "appropriate relief against a government" in RFRA should similarly be understood not to provide for money damages against federal officials in their individual capacities. "Given that RFRA and RLUIPA attack the same wrong, in the same way, in the same words, it is implausible that 'appropriate relief against a government' means something different in RFRA, and includes money damages." App., *infra*, 53a (Jacobs, J., dissenting from the denial of reh'g en banc). Indeed, it would be anomalous if federal officers were personally exposed to damages, as the court of appeals

held here, but the federal government, the States, and individual state officials were not.

To be sure, in holding that "appropriate relief against a government" does not include damages awarded against a State for purposes of RLUIPA, 42 U.S.C. 2000cc-2(a), this Court in *Sossamon* relied in part on concerns about State sovereign immunity. Specifically the Court relied on the principle that a State's waiver of its sovereign immunity must be "'unequivocally expressed,'" and determined that the phrase "appropriate relief against a government" was insufficiently clear to indicate a waiver of sovereign immunity. 563 U.S. at 284 (citation omitted); see *id.* at 289. Here, suing individual officials in their personal capacities avoids that sovereign-immunity concern—but it runs headlong into significant separation-of-power concerns with imposing personal liability on individual federal executive officials. See pp. 12-15, *supra*. It is accordingly just as inappropriate to make damages available against individual federal officials under RFRA. And, as Judge Jacobs pointed out in his dissent from the denial of rehearing en banc, this Court in *Sossamon* "relied not on sovereign immunity alone, but on the plain meaning of the text." App., *infra*, 52a. The statute provides for "appropriate relief *against a government*." 42 U.S.C. 2000bb-1(c) (emphasis added). By making the government the object of the relief, RFRA suggests "that monetary damages are not 'suitable' or 'proper'" at all. *Id.* at 53a (quoting *Sossamon*, 563 U.S. at 286).

4. RFRA's history and purpose further bolster that conclusion. Congress enacted RFRA in the wake of *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and the statutory text makes clear that Congress's primary

aim was to restore the status quo ante that existed before *Smith* and thereby to effectively abrogate that decision. Congress stated that its purposes were to "restore the compelling interest test" that Congress understood to have been in place before *Smith* and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. 2000bb(b). Congress thus intended to "'turn the clock back' to the day before *Smith* was decided." H.R. Rep. No. 88, 103d Cong., 1st Sess. 15 (1993). And the Senate Report reinforces the point: "To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*." S. Rep. No. 111, 103d Cong., 1st Sess. 12 (1993).

In light of that basic aim of effectively abrogating *Smith*, RFRA should not be understood to break new ground and take the dramatic step of providing for money damages against individual federal officers. The only potential basis for obtaining money damages against individual federal officers for a religious-exercise claim before *Smith* would have been via a *Bivens* claim—but this Court has never recognized a *Bivens* claim for damages based on a First Amendment violation, let alone before Congress enacted RFRA. See *Webman*, 441 F.3d at 1028 (Tatel, J., concurring) ("Because Congress enacted RFRA to return to a pre-*Smith* world, a world in which damages were unavailable against the government, 'appropriate relief' is most naturally read to exclude damages against the government."). Indeed, at the time Congress enacted RFRA, this Court had already declined to create an implied damages remedy in a First Amendment suit against a federal employer.

Bush v. *Lucas*, 462 U.S. 367, 390 (1983); see *Abbasi*, 137 S. Ct. at 1857.

At most, the phrase "appropriate relief" can be understood in light of the statutory purpose to be agnostic as to whether any particular kind of relief is available, and instead simply to indicate that whatever relief a plaintiff could obtain under the First Amendment before *Smith* is now available under RFRA after *Smith*. But if a plaintiff can obtain money damages against individual federal officers only to the same extent they would be available under *Bivens* absent *Smith*, then they are not available at all: This Court's subsequent decisions eliminate the ambiguity and make clear that *Bivens* relief does not extend to this novel context, regardless of anything in *Smith*. See *Abbasi*, 137 S. Ct. at 1855-1858; *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009) ("[W]e have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment."); App., *infra*, 76a-94a.

B. There Is No Basis For Presuming That Congress Intended Individual Officers To Be Liable For Damages

1. The court of appeals reached a contrary result largely by relying on *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), which it understood to support a presumption that money damages are available under a federal cause of action, absent a clear indication that they are unavailable. See App., *infra*, 24a-26a. But *Franklin* is inapposite.

In *Franklin*, this Court held that money damages are available under the cause of action this Court had previously found to be implied under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, see *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979).

Franklin, 503 U.S. at 76. In reaching that result, the Court relied on a general background principle that, when a cause of action exists under federal law, courts will "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66; see *id.* at 70-71 ("The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.").

This case cannot be decided based on any presumption that damages are usually available under a federal cause of action, however, because this Court's decision in *Sossamon* already establishes that damages are *not* available in many RFRA cases. Specifically, in *Sossamon*, this Court determined that the presumption reflected in *Franklin* was inapplicable when interpreting the phrase "appropriate relief against a government" in RLUIPA. The Court explained that any presumption under *Franklin* "is irrelevant to construing the scope of an express waiver of sovereign immunity," and emphasized that *Franklin* "did not involve sovereign defendants, so the Court had no occasion to consider sovereign immunity." *Sossamon*, 563 U.S. at 288, 289 n.6. Instead, the Court relied on the opposite presumption that damages are *not* available against a sovereign unless "Congress has given clear direction that it intends to *include* a damages remedy." *Id.* at 289. Consistent with *Sossamon*, the courts of appeals have uniformly held that damages are not available under RFRA against the federal government, because the phrase "appropriate relief against a government" is insufficient to waive the federal government's sovereign immunity. See p. 17, *supra* (collecting cases).

Of course, RFRA's cause of action applies to both sovereign and non-sovereign defendants. But the dual character of RFRA's cause of action means that this case cannot be decided simply by pointing to a background presumption that damages are usually available, when damages are usually not available for the primary class of defendants (sovereign "government[s]") identified in the statute. 42 U.S.C. 2000bb-1(c). If anything, for the reasons set forth above, the proper approach here is to apply a single presumption against the availability of money damages in all actions under RFRA: Congress should be required to speak clearly, as it did in Section 1983 and other statutes, before a court will authorize an award of damages against an individual federal official.

In any event, *Franklin*'s holding that money damages are available under Title IX did not rest solely on a presumption that damages are available under a federal cause of action. Instead, this Court also looked to the statutory context, including Congress's subsequent amendment of Title IX to waive States' sovereign immunity and make available "remedies both at law and in equity." *Franklin*, 503 U.S. at 72 (quoting 42 U.S.C. 2000d-7(a)(2)). As set forth above, no similar contextual clues indicate that Congress intended to make "remedies * * * at law," *ibid.*, available under RFRA.

2. There is also no sound basis for understanding RFRA's phrase "appropriate relief against a government" to incorporate the presumption reflected in *Franklin* and thus to indicate that damages are available against individual officers. If Congress had actually considered the issue and intended to make such damages available, it could have done so far more directly, such as by expressly providing for damages. And al-

though Congress is presumed to be familiar with applicable judicial precedent, see *Ryan* v. *Gonzales*, 568 U.S. 57, 66 (2013), the phrase "appropriate relief against a government" appears nowhere in *Franklin*. The Court in *Franklin* construed an implied cause of action, not an express one. See *Sossamon*, 563 U.S. at 288. And the Court used a variety of formulations, including "appropriate relief," "appropriate remedies," "'all necessary and appropriate remedies,'" "'any available remedy,'" *Franklin*, 503 U.S. at 66, 69, 74 (citations omitted), without suggesting that any particular formulation was a term of art necessarily implying damages. Finally, the phrase "appropriate relief" was first introduced into the draft of RFRA in 1990, several years before this Court decided *Franklin*. See H.R. 5377, 101st Cong., 2d Sess., § 2(c) (1990). There is no indication in the legislative history that any Member of Congress later considered *Franklin* to be relevant when deciding what kinds of remedy would be available under that preexisting language.

C. The Question Presented Warrants This Court's Review

The question whether federal officers can be individually liable for money damages under RFRA warrants this Court's review. This is a pure question of statutory interpretation that recurs with some frequency. And although there is not a circuit conflict—the Second Circuit's decision here accords with the Third Circuit's decision in *Mack* v. *Warden Loretto FCI*, 839 F.3d 286 (3d Cir. 2016)—and the posture here is interlocutory, the question has considerable and immediate practical importance to the federal government and its employees.

This case illustrates the threat individual-capacity damages may pose to the "sensitive functions of the Ex-

ecutive Branch." *Abbasi*, 137 S. Ct. at 1861. The allegations in this lawsuit concern purported efforts by FBI agents to obtain assistance from respondents in connection with investigations into potential terrorist or criminal activity, including by noncitizens. The investigations thus implicated both national security and immigration, core powers of the Executive Branch. See *ibid.* (national security); *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (same); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (immigration). In particular, discovery in a national security-related lawsuit, which may be necessary in some cases even to assess a qualified-immunity defense among individual defendants, may cause even greater harm to the Executive's functioning. See *Iqbal*, 556 U.S. at 685 (harms from diverting officials from their duties "magnified" in national security context). The potential costs of allowing a damages remedy, both in deterring government officials from discharging their duties and imposing the burdens of litigation and discovery even when a qualified-immunity defense is available, militate strongly in favor of immediate review. See *Abbasi*, 137 S. Ct. at 1856-1857.

The nature of a RFRA claim makes those burdens of suit even heavier. "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task" under the substantial-burden test reinstated by RFRA, and indeed "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit * * * protection" under that test. *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981); see *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993). Yet under the decision of the court of

appeals, a federal law enforcement officer or other employee whose actions place a substantial burden on the exercise of those beliefs, even those not "comprehensible to others," *Thomas*, 450 U.S. at 714, would be faced with the potential for drawn-out and disruptive litigation followed by possible individual liability for an unknown and conceivably devastating damages award. Cf. *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1725 (2019) ("Any inartful turn of phrase or perceived slight * * * could land an officer in years of litigation."). In this case, petitioners "were never told that [respondents] believed cooperating with an investigation 'burdened their religious beliefs.'" App., *infra*, 58a (Jacobs, J., dissenting from the denial of reh'g en banc). Yet under the court's decision, they may be forced to proceed to discovery.

Moreover, if available, damages will serve as a powerful incentive for potential plaintiffs to sue federal employees at all levels of decisionmaking, more broadly affecting the government's operations. For instance, prison officials are charged with accommodating the religious practices of approximately 180,000 federal inmates, while balancing prisoners' needs against the demands of prison safety and security. See Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Prisoners in 2017*, at 3 (Apr. 2019).[3] Numerous individual officials along the Bureau of Prisons' chain of authority may make decisions regarding religious accommodations, and each could potentially be sued personally for damages for a decision allegedly burdening an inmate's religious practice. Or officers of the Drug Enforcement Administration could be sued in their in-

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[3] https://www.bjs.gov/content/pub/pdf/p17.pdf.

dividual capacities for enforcing federal law by plaintiffs claiming a religious purpose for their use of drugs. In these and other scenarios, federal officials would be discouraged from performing their duties by the prospect of litigation and potentially severe personal financial consequences. The question of whether Congress provided for a damages remedy against individual federal officials, when it merely provided for "appropriate relief against a government," 42 U.S.C. 2000bb-1(c), accordingly warrants this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-1176
Aug. Term, 2016

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, NAVEED SHINWARI, PLAINTIFFS-APPELLANTS

v.

FNU TANZIN, SPECIAL AGENT, FBI; SANYA GARCIA, SPECIAL AGENT, FBI; JOHN LNU, SPECIAL AGENT, FBI; FRANCISCO ARTUSA, SPECIAL AGENT, FBI; JOHN C. HARLEY III, SPECIAL AGENT, FBI; STEVEN LNU, SPECIAL AGENT, FBI; MICHAEL LNU, SPECIAL AGENT, FBI; GREGG GROSSOEHMIG, SPECIAL AGENT, FBI; WEYSAN DUN, SPECIAL AGENT IN CHARGE, FBI; JAMES C. LANGENBERG, ASSISTANT SPECIAL AGENT IN CHARGE, FBI; JOHN DOE #1, SPECIAL AGENT, FBI; JOHN DOE #2, SPECIAL AGENT, FBI; JOHN DOE #3, SPECIAL AGENT, FBI; JOHN DOE #4, SPECIAL AGENT, FBI; JOHN DOE #5, SPECIAL AGENT, FBI; JOHN DOE #6, SPECIAL AGENT, FBI, DEFENDANTS-APPELLEES[1]

Argued: Mar. 1, 2017
Decided: May 2, 2018
Amended: June 25, 2018

Before: KATZMANN, Chief Judge, POOLER, and LYNCH, Circuit Judges.

[1] The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

POOLER, Circuit Judge:

Plaintiffs-Appellants Muhammad Tanvir, Jameel Algibah, and Naveed Shinwari ("Plaintiffs") appeal from a February 17, 2016 final judgment of the United States District Court for the Southern District of New York (Abrams, *J.*), dismissing their complaint against senior federal law enforcement officials and 25 named and unnamed federal law enforcement officers. As relevant here, the complaint alleged that, in retaliation for Plaintiffs' refusal to serve as informants, federal officers improperly placed or retained Plaintiffs' names on the "No Fly List," in violation of Plaintiffs' rights under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA").

The complaint sought (1) injunctive and declaratory relief against all defendants in their official capacities for various constitutional and statutory violations, and (2) compensatory and punitive damages from federal law enforcement officers in their individual capacities for violations of their rights under the First Amendment and RFRA. As relevant here, the district court held that RFRA does not permit the recovery of money damages against federal officers sued in their individual capacities. Plaintiffs appeal that RFRA determination only.

Because we disagree with the district court, and hold that RFRA permits a plaintiff to recover money damages against federal officers sued in their individual capacities for violations of RFRA's substantive protections, we reverse the district court's judgment and remand for further proceedings.

BACKGROUND

On appeal from the district court's dismissal of Plaintiffs' complaint, we "accept[] as true factual allegations in the complaint, and draw[] all reasonable inferences in the favor of the plaintiffs." *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 227 (2d Cir. 2012).

I. Relevant Factual and Procedural Background

Plaintiffs are Muslim men who reside in New York or Connecticut. Each was born abroad, immigrated to the United States early in his life, and is now lawfully present here as either a U.S. citizen or as a permanent resident. Each has family remaining overseas.

Plaintiffs assert that they were each approached by federal agents and asked to serve as informants for the FBI. Specifically, Plaintiffs were asked to gather information on members of Muslim communities and report that information to the FBI.[2] In some instances, the FBI's request was accompanied with severe pressure, including threats of deportation or arrest; in others, the request was accompanied by promises of financial and other assistance. Regardless, Plaintiffs rebuffed those repeated requests, at least in part based on their sincerely-held religious beliefs. In response to these refusals, the federal agents maintained Plaintiffs on the

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[2] Plaintiffs assert that they were caught up in a broader web of federal law enforcement mistreatment of American Muslims. They allege that, following the tragic attacks of September 11, 2001, "the FBI has engaged in widespread targeting of American Muslim communities for surveillance and intelligence-gathering." App'x at 66 ¶ 36. These law enforcement practices included "the aggressive recruitment and deployment of informants . . . in American Muslim communities, organizations, and houses of worship." *Id.*

national "No Fly List," despite the fact that Plaintiffs "do[] not pose, ha[ve] never posed, and ha[ve] never been accused of posing, a threat to aviation safety." App'x at 74, 84, 92 ¶¶ 68, 118, 145.

According to the complaint, Defendants "forced Plaintiffs into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to the punishment of placement or retention on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid being placed on the No Fly List or to secure removal from the No Fly List." App'x at 109 ¶ 210. Plaintiffs allege that this dilemma placed a substantial burden on their exercise of religion.

Additionally, Defendants' actions caused Plaintiffs to suffer emotional distress, reputational harm, and economic loss. As a result of Defendants' actions placing and retaining Plaintiffs on the "No Fly List," Plaintiffs were prohibited from flying for several years. Such prohibition prevented Plaintiffs from visiting family members overseas, caused Plaintiffs to lose money they had paid for plane tickets, and hampered Plaintiffs' ability to travel for work.[3]

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[3] One Plaintiff, for example, had to quit a job as a long-haul trucker because that job required him to fly home after completing his route, while another declined temporary employment in Florida due to these travel restrictions. These same restrictions barred another Plaintiff from traveling to Pakistan to visit his ailing mother, and rendered yet another Plaintiff unable to see his wife or daughter in Yemen for many years.

A. The "No Fly List"

In an effort to ensure aircraft security, Congress directed the Transportation Security Administration ("TSA") to establish procedures for notifying appropriate officials of the identity of individuals "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety." 49 U.S.C. § 114(h)(2). TSA was further instructed to "utilize all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government" to perform a passenger prescreening function. 49 U.S.C. § 44903(j)(2)(C)(ii).

The "No Fly List" is one such terrorist watchlist and is part of a broader database developed and maintained by the Terrorist Screening Center ("TSC"), which is administered by the FBI. The TSC's database contains information about individuals who are known or reasonably suspected of being involved in terrorist activity. The TSC shares the names of individuals on the "No Fly List" with federal and state law enforcement agencies, the TSA, airline representatives, and cooperating foreign governments.

Plaintiffs allege that federal law enforcement and intelligence agencies may "nominate" an individual for inclusion in the TSC's database, including the "No Fly List," if there is "reasonable suspicion" that the person is a "known or suspected terrorist." App'x at 68 ¶ 41. In order for a nominated individual to be added to the "No Fly List," there must be additional "derogatory information" showing that the individual "pose[s] a threat of committing a terrorist act with respect to an aircraft." App'x at 68 ¶ 42. Any person placed on the "No Fly

List" is barred from boarding a plane that starts in, ends in, or flies over the United States.[4]

Plaintiffs claim that the federal agents named in the amended complaint "exploited the significant burdens imposed by the No Fly List, its opaque nature and ill-defined standards, and its lack of procedural safeguards, in an attempt to coerce Plaintiffs into serving as informants within their American Muslim communities and places of worship." App'x at 59 ¶ 8. When rebuffed, the federal agents "retaliated against Plaintiffs by placing or retaining them on the No Fly List." *Id.*

B. Tanvir: An Illustrative Story

As did the district court below, we present Tanvir's story as illustrative of Plaintiffs' experiences.

At the time the complaint was filed, Tanvir was a lawful permanent resident living in Queens, New York. Tanvir's wife, son, and parents remain in Pakistan. In February 2007, Tanvir alleged that FBI Special Agents FNU Tanzin and John Doe 1 approached him at work and questioned him for 30 minutes about an acquaintance who allegedly entered the United States illegally. Two days later, Agent Tanzin called Tanvir and asked whether he had anything he "could share" with the FBI about the American Muslim community. App'x at 74

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[4] In their amended complaint, Plaintiffs decry the secrecy around the "No Fly List," alleging that there is little public information about its size, the criteria for inclusion, the standards for "derogatory information," or the adequacy of its procedural safeguards. Upon information and belief, Plaintiffs assert that the "No Fly List" burgeoned from 3,400 individuals in 2009 to over 21,000 individuals by February 2012.

¶ 70. Tanvir said he told Agent Tanzin that he knew nothing relevant to law enforcement.

In July 2008, after returning home from a trip to Pakistan to visit his family, Tanvir was detained by federal agents for five hours at JFK Airport. His passport was confiscated and he was told he could retrieve it on January 28, 2009, nearly six months later. Two days prior to that appointment, Agent Tanzin and FBI Special Agent John Doe 2 visited Tanvir at his new workplace and asked him to come to the FBI's Manhattan field office. Tanvir agreed.

At the FBI field office, the federal agents questioned Tanvir for about an hour. The agents asked Tanvir whether he was aware of Taliban training camps near his home village in Pakistan and whether he had Taliban training. Tanvir denied knowledge of the camps or participation in such training.

After the questioning, Agents Tanzin and John Doe 2 complimented Tanvir and asked him to work as an informant for the FBI in Pakistan or Afghanistan. Tanvir alleged that they offered him various incentives, including facilitating visits for his family to the United States and paying for his parents' religious pilgrimage. Despite the offer, Tanvir declined, stating that he did not want to be an informant. The agents persisted, threatening Tanvir that his passport would not be returned and he would be deported if he failed to cooperate. Tanvir implored the agents not to deport him. At the meeting's end, the agents asked Tanvir to reconsider and to keep their conversation private.

The next day, Agent Tanzin asked Tanvir if he had reconsidered and would become an informant. Agent

Tanzin threatened Tanvir with deportation if he did not cooperate. Again, Tanvir declined.

On January 28, 2009, Tanvir recovered his passport from Department of Homeland Security ("DHS") officers at JFK Airport without incident. The DHS officers said his passport was withheld for an investigation, but that the investigation was complete. Nevertheless, the next day, Agent Tanzin called Tanvir and said that he asked for the release of Tanvir's passport because Tanvir was "cooperative" with the FBI. App'x at 77 ¶ 81.

The FBI agents continued to pressure Tanvir to work as an informant over the next few weeks. Tanvir received numerous calls and visits at his workplace from Agents Tanzin and John Doe 1. Tanvir stopped answering their phone calls and asked them to stop their visits. Later, the agents asked Tanvir to submit to a polygraph test, and when he declined, they threated to arrest him. When Tanvir flew to Pakistan in July 2009 to visit his family, Agents Tanzin and John Doe 3 questioned Tanvir's sister at her workplace about Tanvir's travel.

After Tanvir returned to the United States in January 2010, he took a job as a long-haul trucker. The job required him to drive across the country and fly back to New York after he had completed his route.

In October 2010, Tanvir heard that his mother was visiting New York from Pakistan. Tanvir, who had been in Atlanta for work, booked a flight back to New York. When he arrived at the Atlanta airport, an airline employee told Tanvir that he could not fly. At that time, two FBI agents approached Tanvir and told him to call the agents who had previously spoken to him in New

York. Tanvir contacted Agent Tanzin, who instructed that other agents would contact Tanvir and that he should "cooperate." App'x at 79 ¶ 92. Unable to fly to New York, Tanvir traveled by bus—a 24-hour ride.

Two days later, FBI Special Agent Sanya Garcia contacted Tanvir. She told him that if he met with her and answered her questions, she would help remove his name from the "No Fly List." Tanvir declined, saying that he had already answered the FBI's questions. Because Tanvir believed he could no longer fly, and therefore could not return to New York after completing his one-way deliveries, he quit his job as a long-haul trucker.

On September 27, 2011, Tanvir filed a complaint with the DHS Traveler Redress Inquiry Program ("TRIP"), an administrative mechanism for filing a complaint about placement on the "No Fly List."

The next month, Tanvir purchased tickets to Pakistan for himself and his wife so that they could visit his ailing mother. The day before his flight, Agent Garcia told Tanvir that he would not be able to fly unless he met with her and answered her questions. Because of his urgent need to travel, Tanvir agreed to do so. After answering the same questions that the other agents asked him previously, Tanvir pleaded with Agent Garcia to allow him to fly to Pakistan the next day. The next day, Agent Garcia told Tanvir that he could not fly. Moreover, she stated that he could not fly in the future unless he submitted to a polygraph test. Tanvir cancelled his flight and received only a partial refund. His wife traveled alone to Pakistan.

After this incident, Tanvir hired counsel. Tanvir's counsel communicated with FBI lawyers. The FBI lawyers directed Tanvir's counsel to the TRIP process, even though Tanvir had already submitted a TRIP complaint and not yet received any redress.

Tanvir persisted, buying another plane ticket to Pakistan to visit his ailing mother. On December 11, 2011, however, he was denied boarding and told he was on the "No Fly List." This was the third time Tanvir was barred from boarding a flight for which he had purchased a ticket.

In April 2012, nearly six months after Tanvir filed his complaint with TRIP, he received a response. The response did not acknowledge that he was on the "No Fly List," but noted that "no changes or corrections are warranted at this time." App'x at 83 ¶ 110. Tanvir appealed this TRIP determination.

In November 2012, Tanvir purchased another ticket to Pakistan in an effort to visit his ailing mother. Again, Tanvir was denied boarding when he arrived for his flight. An FBI agent approached Tanvir and his counsel at the airport and told them that Tanvir would not be removed from the "No Fly List" until he met with Agent Garcia.

In March 2013, ten months after Tanvir appealed his TRIP determination, he received a letter from DHS overturning that earlier determination. The letter blamed Tanvir's experience on probable "misidentification against a government record" or "random selection," and stated that the government "made updates" to its records. App'x at 83 ¶ 114. Following this communication, Tanvir purchased a plane ticket to Pakistan for June 2013. On

June 27, 2013, Tanvir successfully boarded a flight to Pakistan. By this time, over five years had passed since Tanvir was first contacted by the FBI.

Tanvir asserts that because the federal agents wrongfully placed his name on the "No Fly List," Tanvir could not fly to visit his family in Pakistan, quit his trucking job, lost money from unused airline tickets, and feared additional harassment by the FBI.

C. Procedural History

On October 1, 2013, Plaintiffs filed a complaint asserting that Defendants violated their constitutional and statutory rights by placing their names on the "No Fly List"—even though they posed no threat to aviation safety—in retaliation for their refusal to become informants for the government. On April 22, 2014, Plaintiffs filed an amended complaint.

Plaintiffs sued Defendants in their official capacities under the First Amendment, the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. §§ 702, 706, and RFRA, 42 U.S.C. § 200bb *et seq.*, seeking injunctive and declaratory relief. Plaintiffs also sued the federal agents in their individual capacities, seeking compensatory and punitive damages under the First Amendment and RFRA.[5]

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[5] Plaintiffs and non-appealing plaintiff Awais Sajjad asserted a First Amendment retaliation claim against all 25 federal agents named as Defendants. Plaintiffs, excluding Sajjad, asserted a claim under RFRA against only the 16 federal agents named as Defendants that allegedly interacted with Plaintiffs.

On July 28, 2014, the Defendants filed two separate motions to dismiss the amended complaint. One motion sought to dismiss Plaintiffs' official capacity claims; the other sought to dismiss Plaintiffs' individual capacity claims.

On June 1, 2015, the government moved to stay Plaintiffs' official capacity claims, arguing that it had revised the redress procedures available to challenge one's designation on the "No Fly List," and that Plaintiffs had availed themselves of those procedures. On June 8, 2015, Plaintiffs received letters from DHS informing them that the government knows of no reason why they would be unable to fly. On June 10, 2015, Plaintiffs consented to a stay of their official capacity claims. The district court stayed those claims and terminated the government's related motion to dismiss. The parties continued to dispute Plaintiffs' individual capacity claims.

D. District Court Opinion

On September 3, 2015, the district court issued an opinion and order dismissing Plaintiffs' individual capacity claims.

First, the district court dismissed Plaintiffs' First Amendment retaliation claims, stating that the Supreme Court and this Court have "declined to extend *Bivens* to a claim sounding in the First Amendment." *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 769 (S.D.N.Y. 2015) (quoting *Turkmen v. Hasty*, 789 F.3d 218, 236 (2d Cir. 2015), *rev'd in part and vacated and remanded in part sub nom. Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)). Plaintiffs do not appeal that determination here.

Next, the district court held that RFRA does not permit the recovery of money damages from federal officers sued in their individual capacities. The district court determined that "Congress' intent in enacting RFRA could not be clearer." *Tanvir*, 128 F. Supp. 3d at 780. Specifically, the court determined that Congress intended to restore the compelling interest test by which courts evaluated free exercise claims before the Supreme Court's decision in *Employment Division, Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). In doing so, it held that Congress did not express an intention to expand the remedies available to those individuals who asserted that their free exercise of religion was substantially burdened by the government.

The district court found this conclusion supported by the state of the law at the time RFRA was passed, and RFRA's legislative history. With respect to the former, the district court stated that, at the time *Smith* was decided, the Supreme Court had not recognized a *Bivens* remedy for claims under the Free Exercise Clause, and to allow damages in this case against federal employees would expand, rather than restore, the remedies available prior to *Smith*. With respect to the latter, the district court identified congressional reports stating that Congress in RFRA did not intend to "expand, contract or alter the ability of a claimant to obtain relief in a manner consistent" with the Supreme Court's pre-*Smith* free exercise jurisprudence. *Tanvir*, 128 F. Supp. 3d at 778 (quoting S. Rep. No. 103-111 at 12).

Finally, the district court rejected Plaintiffs' assertions with respect to *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992). In *Franklin*, the Supreme

Court stated that "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66. The district court nevertheless found that the traditional *Franklin* presumption did not apply here. In particular, the district court noted that "*Franklin* required the Supreme Court to interpret an *implied* statutory right of action," and held that *Franklin*'s "ordinary convention" does not control where, as here, Congress created an express private right of action. *Tanvir*, 128 F. Supp. 3d at 779.

Plaintiffs appeal the district court's ruling that RFRA does not permit the recovery of money damages from federal officers sued in their individual capacities.[6] We agree with Plaintiffs, and reverse.

DISCUSSION

I. Standard of Review

We review de novo a district court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). *Town of Babylon*, 699 F.3d at 227. When reviewing the dismissal of a complaint for failure to state a claim, we accept as true the factual allegations in the complaint and draw all reasonable inferences in plaintiff's favor. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible

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[6] Plaintiffs voluntarily dismissed their official capacity claims on December 28, 2015, rendering the district court's ruling on the individual claims a final appealable order. *See Tanvir v. Comey*, No. 1:13-cv-06951-RA (docs. 109, 111).

on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

The district court here held that RFRA does not permit a plaintiff to recover money damages against federal officers sued in their individual capacities. *Tanvir*, 128 F. Supp. 3d at 775. Where, as here, the district court decision below "presents only a legal issue of statutory interpretation," "[w]e review *de novo* whether the district court correctly interpreted the statute." *White v. Shalala*, 7 F.3d 296, 299 (2d Cir. 1993).

II. Official Capacity and Individual Capacity Suits

The district court held that RFRA does not permit the recovery of money damages against federal officers sued in their individual capacities. To frame our discussion, we briefly address the difference between official capacity suits and individual capacity suits.

The Supreme Court has stated that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citation and internal quotation marks omitted). In an official capacity suit, "the real party in interest . . . is the governmental entity and not the named official." *Id.* By contrast, individual capacity suits "seek to impose individual liability upon a government officer for [her] actions under color of [] law." *Id.* Any damages awarded in an individual capacity suit "will not be payable from the public fisc but rather will come from the pocket of

the individual defendant." *Blackburn v. Goodwin*, 608 F.2d 919, 923 (2d Cir. 1979).[7]

This distinction proves important with respect to the recovery of damages. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (citation omitted). Sovereign immunity does not, however, shield federal officials sued in their individual capacities. *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) ("[S]overeign immunity does not erect a barrier against suits to impose individual and personal liability.") (internal quotation marks omitted).

III. Religious Freedom Restoration Act

"As in any case of statutory construction, we start our analysis . . . with the language of the statute." *Chai v. Comm'r of Internal Revenue*, 851 F.3d 190, 217 (2d Cir. 2017) (citation omitted). "Where the statutory language provides a clear answer, our analysis ends there." *Id.* (citation and internal punctuation omitted). "[I]f the meaning of the statute is ambiguous, we may resort to canons of statutory interpretation to help resolve the ambiguity." *Id.* (citation and brackets omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and

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[7] Suits against public officers that seek damages are directed at the particular officer whose allegedly unlawful actions are claimed to have caused damage to plaintiffs. In contrast, suits against officers in their official capacity, which generally seek injunctive relief, are directed at the office itself. *See* Fed. R. Civ. P. 17(d). As a result, if the defendant in an official capacity suit leaves office, the successor to the office replaces the originally named defendant. *See* Fed. R. Civ. R. 25(d).

the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

A. Statutory Text

In 1993, Congress passed RFRA. 42 U.S.C. § 2000bb, *et seq*. Congress stated that its purposes in enacting RFRA were "to restore the compelling interest test" that been applied in cases where free exercise of religion was substantially burdened *and* "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Through RFRA, Congress sought "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the "Government" can "demonstrate[] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

In order to protect this statutory right, RFRA created an explicit private right of action. *Id.* § 2000bb-1(c). That section permits any "person whose religious exercise has been burdened in violation of [the statute]" to "assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate relief against a government*." *Id.* § 2000bb-1(c) (emphasis added). RFRA defines the term "government," to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States."

Id. § 2000bb-2(1). RFRA does not define the term "appropriate relief."

In its decision below, the district court determined that the phrase "appropriate relief" did not include money damages from federal officials sued in their individual capacities. *See Tanvir*, 128 F. Supp. 3d at 775. The district court did not address whether federal officers sued in their individual capacities are included within RFRA's definition of "government" and therefore amenable to suit under RFRA. *See id.* at 774 n.17.

B. "Against a Government"

On appeal, the parties disagree over whether RFRA authorizes individual capacity suits against government officials. In construing the meaning of the term "government" under RFRA, we begin by reviewing RFRA's plain language. *See Chai*, 851 F.3d at 217. Because RFRA's plain language "provides a clear answer," we conclude that RFRA authorizes individual capacity claims against federal officers. *Id.*

As discussed above, RFRA permits a plaintiff to assert a violation of the statute "as a claim or defense in a judicial proceeding and obtain relief against a government." 42 U.S.C. § 2000bb-1(c). RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.* § 2000bb-2(1). When we substitute that definition for the defined term, it is clear that a plaintiff may bring a claim for "appropriate relief against" either a federal "official" or "other person acting under color of [federal] law" whose actions substantially burden the plaintiff's religious exercise.

Therefore, RFRA, by its plain terms, authorizes individual capacity suits against federal officers.

Defendants argue, to the contrary, that the plain text of RFRA permits suits only against officers in their official capacities and not suits against federal officers in their individual capacities. Defendants argue that we: (1) should give the term "government" its most natural reading; (2) should understand the phrase "official" in the statutory definition of "government" as suggesting that only official capacity suits are permitted; and (3) should conclude that the phrase "or other person acting under color of law" is not intended to permit government officers to be sued in their individual capacities. We disagree with each argument.

First, we refuse Defendants' request to apply a natural reading of the term "government" in this case where RFRA includes an explicit definition of "government." 42 U.S.C. § 2000bb-2(1). "When a statute includes an explicit definition, we must follow that definition." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 575 (2d Cir. 2016) ("In general, statutory definitions control the meaning of statutory words.") (internal quotation marks omitted). Further, the statute specifically defines 'government' to include officials and others acting under color of law. There would be no need to permit suits against government agents in their official capacity, since such a suit is simply a formal variant of an action that, in substance, runs against the government itself. *See Hafer*, 502 U.S. at 25.

Second, RFRA's use of the word "official" in the statutory definition of "government" does not mandate that a plaintiff may only obtain relief against federal officers

in official capacity suits. In ordinary usage, an "official" is generally defined simply as "one who holds or is invested with an office" and is roughly synonymous with the term "officer." Merriam-Webster Unabridged, http:/unabridged.merriam-webster.com/unabridged/official (noun definition). There is no reason to think that, in using this ordinary English word, Congress intended to invoke the technical legal concept of "official capacity," rather than simply to state that government "officials" are amenable to suit. Moreover, the statute permits suits against "officials (or other person[s] acting under color of law)." 42 U.S.C.A. § 2000bb-2(1). The specific authorization of actions broadly against "other person[s] acting under color of law," undercuts the assertion that the term "official"' was intended to limit the scope of available actions.

Further, a defendant's status as a federal officer "is not controlling" in determining whether a suit is, in reality, against the government. *Stafford v. Briggs*, 444 U.S. 527, 542 n.10 (1980) (citation omitted). Rather, "the dispositive inquiry is 'who will pay the judgment?'" *Id.* A plaintiff may not sue a federal officer in her official capacity for money damages, because such suit seeks money from the federal government, and sovereign immunity would bar recovery from the federal government absent an explicit waiver. However, a plaintiff may sue a federal officer in her individual capacity without implicating sovereign immunity concerns. *See Hafer*, 502 U.S. at 25-28. RFRA's use of the word "official" does not alter that rule.

Third, we reject Defendants' argument that the phrase "other person acting under color of law" authorizes only

official capacity suits. Rather, that phrase "contemplates that persons 'other' than 'officials' may be sued under RFRA, and persons who are not officials may be sued *only* in their individual capacities." *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44, 50 (D.D.C. 2015) (citing *Jama v. INS*, 343 F. Supp. 2d 338, 374 (D. N.J. 2004)) (emphasis added). "Defendants' interpretation would render the entire phrase surplasage: once Congress authorized official-capacity suits against 'officials,' adding another term that allowed only official-capacity suits would have had no effect whatsoever." *Id.*

Our conclusion that RFRA authorizes individual capacity claims against federal officers is consistent with the Supreme Court's recognition of RFRA's "[s]weeping coverage," *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), which "was designed to provide very broad protection for religious liberty," *Hobby Lobby*, 134 S. Ct. at 2767. RFRA's reach "ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *City of Boerne*, 521 U.S. at 532 (further stating that RFRA's restrictions "apply to every agency and official of the Federal . . . Government[]").

Moreover, we draw support for our conclusion from Congress's use of comparable language in enacting 42 U.S.C. § 1983, which, long prior to RFRA's enactment, had consistently been held to authorize individual and official capacity suits. *See, e.g.*, *Hafer*, 502 U.S. at 25; *Graham*, 473 U.S. at 166. Section 1983 creates a private right of action against "persons" who, acting "under color of [law]," violate a plaintiff's constitutional rights—regardless of whether that person was acting

pursuant to an unconstitutional state law, regulation, or policy. 42 U.S.C. § 1983.

We, like several of our sister circuits before us, do not find "this word choice [] coincidental," as "Congress intended for courts to borrow concepts from § 1983 when construing RFRA." *Mack v. Warden Loretto FCI*, 839 F.3d 286, 302 (3d Cir. 2016); *see also Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 738 (7th Cir. 2015); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-35 (9th Cir. 1999). As these courts have explained, "[w]hen a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase." *Sutton*, 192 F.3d at 834-35 (citation omitted); *Mack*, 839 F.3d at 302 (quoting same); *see also Leonard v. Israel Discovery Bank*, 199 F.3d 99, 104 (2d Cir. 1999) ("[R]epetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.") (citation and ellipses omitted).

In light of this presumption, given both RFRA's and Section 1983's applicability to "person[s]" acting "under color of law," we hold that RFRA, like Section 1983, authorizes a plaintiff to bring individual capacity claims against federal officials or other "person[s] acting under color of [federal] law."

C. "Appropriate Relief"

Having determined that RFRA permits individual capacity suits against government officers acting under color of law, we now turn to whether "appropriate relief" in that context includes money damages. In its opinion

below, the district court held that "appropriate relief" did not include money damages in suits against federal officers in their individual capacities. *Tanvir*, 128 F. Supp. 3d at 780-81. We disagree.

a. Ambiguity and the *Franklin* Presumption

Starting with RFRA's statutory text, as we do in any case of statutory construction, we note that RFRA does not define the phrase "appropriate relief." *See Chai*, 851 F.3d at 217. Unable to draw further insight from a plain reading of the statute, we turn to the context in which the language is used and the context of the statute more broadly. *See Robinson*, 519 U.S. at 341.

In the context of RFRA's companion statute, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*,[8] the Supreme Court acknowledged that the phrase "'appropriate relief' is open-ended and ambiguous about what types of relief it includes . . . Far from clearly identifying money damages, the word 'appropriate' is inherently context-dependent." *Sossamon*, 563 U.S. at 286.

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[8] The district court opinion aptly notes that RFRA and RLUIPA are companion statutes. *See Tanvir*, 128 F. Supp. 3d at 775. After the Supreme Court in *City of Boerne*, 521 U.S. 507, determined that RFRA was unconstitutional as applied to state and local governments because it exceeded Congress's power under Section 5 of the Fourteenth Amendment, Congress passed RLUIPA pursuant to the Spending Clause and Commerce Clause. *See Tanvir*, 128 F. Supp. 3d at 775 n.18; *Sossamon v. Texas*, 563 U.S. 277, 281 (2011). "RLUIPA borrows important elements from RFRA . . . includ[ing] an express private cause of action that is taken from RFRA." *Sossamon*, 563 U.S. at 281. As a result, courts commonly apply RFRA case law to issues arising under RLUIPA and vice versa. *See Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010).

Indeed, "[i]n some contexts, 'appropriate relief' might include damages." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). But in other contexts, "another plausible reading is that 'appropriate relief' covers equitable relief but not damages." *Id.* As with the analogous phrase in RLUIPA, we agree that the phrase "appropriate relief" in RFRA's statutory text is ambiguous.

Having made that determination, "we resort to canons of statutory interpretation to help resolve the ambiguity." *Chai*, 851 F.3d at 217. We turn to the "the venerable canon of construction that Congress is presumed to legislate with familiarity of the legal backdrop for its legislation." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 115 (2d Cir. 2017); *see also Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."). We have stated:

> Of course, Congress may depart from [our traditional legal concepts] . . . But when a statute does not provide clear direction, it is more likely that Congress was adopting, rather than departing from, established assumptions about how our legal . . . system works. We will not lightly assume a less conventional meaning absent a clear indication that such a meaning was intended.

Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 760 F.3d 151, 166 (2d Cir. 2014).

Congress enacted RFRA in the wake of *Franklin*, 503 U.S. 60, a Supreme Court decision issued over a year prior to the enactment of the statute. In *Franklin*, the

Supreme Court stated that when faced with "the question of what remedies are available under a statute that provides a private right of action," it "*presume[s] the availability of all appropriate remedies unless Congress has expressly indicated otherwise*." *Id.* at 65-66 (emphasis added); *see also Carey v. Piphus*, 435 U.S. 247, 255 (1978) (upholding damages remedy under 42 U.S.C. § 1983, even though the enacting Congress did not "address directly the question of damages"). It based that presumption on a long-standing rule that "has deep roots in our jurisprudence:" that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Franklin*, 503 U.S. at 66 (alterations omitted). Applying this traditional presumption in the context of an implied right of action to enforce Title IX, the Supreme Court held that a damages remedy was available. *Id.* at 76.

RFRA permits plaintiffs to "obtain appropriate relief against a government," 42 U.S.C. § 2000bb-1(c), and includes no "express[] indicat[ion]" that it proscribes the recovery of money damages, *Franklin*, 503 U.S. at 66. Because Congress enacted RFRA one year after the Supreme Court decided *Franklin*, and because Congress used the very same "appropriate relief" language in RFRA that was discussed in *Franklin*, the *Franklin* presumption applies to RFRA's explicit private right of action. In light of RFRA's purpose to provide broad protections for religious liberty, *Hobby Lobby*, 134 S. Ct. at 2760, and applying the *Franklin* presumption here, we hold that RFRA authorizes the recovery of money

damages against federal officers sued in their individual capacities.[9]

b. Defendants' Arguments to the Contrary

i. Precedent Does Not Require a Different Outcome

Defendants argue that our holding here is inconsistent with several decisions by the Supreme Court, our Court, and our sister circuits limiting the recovery of money damages in suits under RFRA and RLUIPA. *See Sossamon*, 563 U.S. 277; *Washington v. Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013); *Webman*, 441 F.3d at 1026; *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 840-41 (9th Cir. 2012); *Davila v. Gladden*, 777 F.3d 1198, 1210 (11th Cir. 2015), *cert. denied sub nom. Davila v. Haynes*, 136 S. Ct. 78 (2015). Our holding, however, is not inconsistent with these decisions, each of which is based upon animating principles that are inapplicable here.

In *Sossamon*, the Supreme Court held that the phrase "appropriate relief" in RLUIPA does not permit the re-

[9] Indeed, the determination that RFRA permits individual capacity suits leads logically to the conclusion that it permits a damages remedy against those individuals. An individual capacity suit that is confined to injunctive relief has limited value; official capacity suits for injunctive relief already supply injunctive relief against the governmental entity as a whole. As a result, plaintiffs will rarely, if ever, prefer to enjoin the conduct of a single officer. In contrast, as noted above, suits seeking compensation from officers in their *official* capacity, being in essence suits against the state or federal government itself, are generally barred by sovereign immunity. Thus, individual capacity suits tend to be associated with damages remedies, and official capacity suits with injunctive relief.

covery of money damages against a state or state officers sued in their official capacities. 563 U.S. at 288. The Supreme Court based its conclusion on considerations relating to state sovereign immunity. Namely, when determining whether an act of Congress waives sovereign immunity, the Court stated that such language "will be strictly construed, in terms of scope, in favor of the sovereign." *Id.* at 285. Therefore, in that context, the Court's relevant inquiry was the opposite of the one at issue here: "not whether Congress has given clear direction that it intends to *exclude* a damages remedy, *see Franklin*, [503 U.S.] at 70-71, but whether Congress ha[d] given clear direction that it intend[ed] to *include* a damages remedy." *Sossamon*, 563 U.S. at 289 (emphasis in original). Because the phrase "appropriate relief" in that context did not "unequivocally express[]" Congress's intent to waive state sovereign immunity, the Supreme Court held that RLUIPA did not permit a suit for monetary damages against a state or state officials sued in their official capacities. *Id.* at 288.

Like *Sossamon*, several of our sister circuits have determined that RFRA's prescription for "appropriate relief" does not include damages against the federal government or its officers acting in their official capacities. *See Webman*, 441 F.3d at 1026; *Oklevueha Native Am. Church of Hawaii*, 676 F.3d at 840-41; *Davila* 777 F.3d at 1210. These courts so held because, in the context of suits against the federal government and its officers in their official capacities, the phrase "appropriate relief" similarly does not express an unambiguous waiver of the federal government's sovereign immunity. *See, e.g.*, *Davila*, 777 F.3d at 1210 ("Congress did not unequivocally waive its sovereign immunity in passing RFRA.

RFRA does not therefore authorize suits for money damages against officers in their official capacities.").

The animating principles underlying *Sossamon, Webman*, *Oklevueha Native Am. Church of Hawaii*, and *Davila*, however, are absent from the instant case. Each of those cases involved a question of whether "appropriate relief" under RFRA or RLUIPA permitted suits against a sovereign or its officers in their official capacities. Although the Supreme Court and our sister circuits declined to construe the phrase "appropriate relief" to amount to an explicit waiver of sovereign immunity, Plaintiffs' individual capacity suits against Defendants present no sovereign immunity concerns here. This is so because Plaintiffs seek monetary relief from those officers personally, not from the federal or state government. *See Hafer*, 502 U.S. at 25-28; *Blackburn*, 608 F.2d at 923. As we stated above, "Congress need not waive sovereign immunity to permit an individual-capacity suit against a federal official." *Patel*, 125 F. Supp. 3d at 54 (citing *Larson*, 337 U.S. at 686-87).

Indeed, as the district court below acknowledged in its discussion of precedent, "[b]ecause these decisions . . . are grounded in principles of sovereign immunity, they are of limited assistance in addressing the question of damages against those who 'come to court as individuals.'" *Tanvir*, 128 F. Supp. 3d at 775 n.19 (quoting *Hafer*, 502 U.S. at 27). We agree and similarly find those cases inapplicable here where sovereign immunity concerns are not at play.

Furthermore, our holding that RFRA permits the recovery of money damages against federal officers sued in their individual capacities does not conflict with our decision in *Washington v. Gonyea*. In *Gonyea*, we held

that the phrase "appropriate relief" in RLUIPA prohibits both the recovery of money damages from *state* officers sued in their official capacities and in their individual capacities. *Gonyea*, 731 F.3d at 145. The conclusion that RLUIPA does not permit the recovery of money damages from state officers sued in their official capacities follows directly from the Supreme Court's decision in *Sossamon.* 563 U.S. at 293 ("States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA because no statute expressly and unequivocally includes such a waiver.").

Gonyea's conclusion that RLUIPA does not permit the recovery of money damages from state officers sued in their individual capacities follows from another source: the constitutional basis upon which Congress relied in enacting RLUIPA. RLUIPA "was enacted pursuant to Congress' spending power, which allows the imposition of conditions, such as individual liability, only on those parties actually receiving state funds." 731 F.3d at 145 (citation omitted). "Applying restrictions created pursuant to the Spending Clause to persons or entities other than the recipients of the federal funds at issue would have the effect of binding non-parties to the terms of the spending contract." *Patel*, 125 F. Supp. 3d at 52 (internal quotation marks omitted). "Indeed, to decide otherwise would create liability on the basis of a law never *enacted* by a sovereign with the power to affect the individual rights at issue—*i.e.*, the state receiving the federal funds—and this would raise serious questions regarding whether Congress had exceeded its authority under the Spending Clause." *Gonyea*, 731 F.3d at 146 (emphasis in original; citations and internal punctuation omitted). As a result, in *Gonyea*, we held that

RLUIPA did not permit a plaintiff to sue state officials in their individual capacities because the state prison, and not the state prison officials, was the 'contracting party,' which had "agree[d] to be amenable to suit as a condition to received funds." *Id.* at 145.

RFRA, by contrast, was enacted pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause. *Hankins v. Lyght*, 441 F.3d 96, 105 (2d Cir. 2006). RFRA's constitutional bases thus "do[] not implicate the same concerns" as those relevant to RLUIPA and the Spending Clause, which we addressed in *Gonyea*. *Mack*, 839 F.3d at 303-04; *see also Tanvir*, 128 F. Supp. 3d at 775 n.19. Because the animating principles underlying our decision in *Gonyea* are absent in the instant case, our holding here—that RFRA permits the recovery of money damages from federal officials sued in their individual capacities—and our holding in *Gonyea*—that RLUIPA does not permit the recovery of money damages from state officials sued in their individual capacities—are entirely consistent.

Defendants complain that our holding in this case makes the phrase "appropriate relief" in RFRA into a chameleon. *See United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality op.) (stating that the Supreme Court has "forcefully rejected" the "interpretive contortion" of "giving the same word, in the same statutory provision, different meanings in different factual contexts") (emphasis omitted). But that is incorrect. To the contrary, we are tasked with interpreting the meaning of RFRA's phrase "appropriate relief," an inquiry that is "inherently context-dependent." *Sossamon*, 563 U.S. at 286. Indeed, the word 'appropriate' does not change its meaning; rather, the question addressed in each of these

various contexts is what sort of relief is 'appropriate' in that particular situation. And, since the relevant animating principles vary appreciably across legal contexts, the meaning of 'appropriate' may well take on different meanings in different settings.

At the time of the district court decision below, neither the Supreme Court nor any of our sister circuits had squarely addressed whether RFRA provides for money damages.[10] Since then, however, the Third Circuit has held, as we do now, that RFRA authorizes individual capacity suits against federal officers for money damages. *See Mack*, 839 F.3d at 304.

In *Mack*, the Third Circuit reached that holding by applying the *Franklin* presumption—that any "appropriate relief" is available unless Congress expressly indicates otherwise. *Id.* at 302-03. The court found that its conclusion was buttressed by the fact that, in enacting RFRA, Congress used the exact language ("appropriate relief") discussed by the Supreme Court in *Franklin*. *Id.* at 303. "Congress enacted RFRA one year after *Franklin* was decided and was therefore well aware that 'appropriate relief' means what it says, and

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[10] The Seventh Circuit has previously decided that a plaintiff was entitled to sue state prison officials in their individual capacities for damages. *Mack v. O'Leary*, 80 F.3d 1175, 1177 (7th Cir. 1996) (Posner, *J.*), *vacated on other grounds*, 522 U.S. 801 (1997). Before reaching that conclusion, the court noted that RFRA "says nothing about remedies except that a person whose rights under the Act are violated 'may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate* relief against a government.'" *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000bb-1(c)). The court also acknowledged that the defendants in that case did not contest the availability of damages as a remedy under RFRA. *Id.*

that, without expressly stating otherwise, all appropriate relief would be available." *Id.* at 303.[11] In light of RFRA's purpose of providing broad religious liberty protections, the Third Circuit concluded that it saw "no reason why a suit for money damages against a government official whose conduct violates RFRA would be inconsistent with" that purpose. *Id.*[12]

We agree with the Third Circuit's reasoning in *Mack* and adopt it here. In particular, we reject a strained reading of "appropriate relief" that would be less generous to plaintiffs under RFRA than under implied rights of action, and thus would undermine Congress's intention to "provide broad religious liberty protections." *Id.* Further, as one district court has pointed out, "[i]t seems unlikely that Congress would *restrict the kind of remedies* available to plaintiffs who challenge free exercise violations in the same statute it passed to *elevate the kind of scrutiny* to which such challenges would be entitled." *Jama*, 343 F. Supp. 2d at 374-75 (emphasis in original). Given that Congress has not

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[11] Of note, the Third Circuit in *Mack* stated that "[b]ecause Mack brings his RFRA claim against only [two federal officers] in their individual capacities, the federal government's sovereign immunity to suits for damages is irrelevant here." *Id.* at 302 n.92.

[12] The court in *Mack* drew further support from the similarities between RFRA and 42 U.S.C. § 1983, which has long permitted money damages against state officials sued in their individual capacities. *Id.* By comparison, the court distinguished its earlier decision in *Sharp v. Johnson*, 669 F.3d 144, 154-55 (3d Cir. 2012), in which it found that RLUIPA did not provide for money damages against state officials sued in their individual capacities, by pointing out how Congress's constitutional authorization for RLUIPA (Commerce Clause and Spending Clause) poses concerns not relevant to its analysis of RFRA (Necessary and Proper Clause and Section 5 of Fourteenth Amendment).

specified that individual capacity suits for money damages should be barred under RFRA, and that, unlike in the RLIUPA context, no constitutional conflict prevents their application, we find that such suits are wholly appropriate under this statutory scheme.

ii. The *Franklin* Presumption Is Not Confined to Statutes with Implied Rights of Action

The district court below found that the *Franklin* presumption did not apply in the instant case. *Tanvir*, 128 F. Supp. 3d at 779. In making that determination, the district court noted that *Franklin* "required the Supreme Court to interpret the scope of an *implied* statutory right of action." *Id.* (emphasis in original). By comparison, Congress created an express private right of action in RFRA. *See* 42 U.S.C. § 2000bb-1(c). The district court held that "the *Franklin* presumption is thus inapplicable" to RFRA "and the meaning of 'appropriate relief' must be discerned using the traditional tools of statutory construction." *Tanvir*, 128 F. Supp. 3d at 779. Applying those tools, the district court discerned that Congress lacked an intent to permit money damages under RFRA through its use of the phrase "appropriate relief." *Id.*

Although *Franklin* indeed considered the availability of damages under a statute with an implied private right of action, we are not convinced that the district court's distinction is correct. The logical inference, in our view, runs the other way: one would expect a court to be more cautious about expanding the scope of remedies available for a private right of action that is *not* explicitly provided by Congress, than in determining what remedies are available for a right of action that Congress has expressly created. This is particularly true

where, in creating the right of action, Congress has also explicitly authorized courts to provide any "appropriate relief," without limitation. In fact, the Court in *Franklin* recounted its own case, *Kendall v. United States ex rel. Stokes*, in which it held that damages were available under a statute with an explicit private right of action where that statute failed to specify the remedies available. 37 U.S. (12 Pet) 524, 624 (1838) (stating that to find otherwise would present "a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist").

As discussed above, the Third Circuit in *Mack* applied the *Franklin* presumption in determining that RFRA's express private right of action permitted the recovery of money damages against individuals sued in their individual capacities. *Mack*, 839 F.3d at 303-04; *see also Patel*, 125 F. Supp. 3d at 53 n.1 ("[T]he mere mention of remedies [in RFRA] does not rebut the [*Franklin*] presumption;" rather, the phrase "appropriate relief" "does nothing more than authorize what courts applying *Franklin* presume, and it falls far short of an express indication that damages are prohibited.") (internal punctuation omitted). Other courts have applied the *Franklin* presumption in the context of statutes containing express private rights of action. *See, e.g.*, *Reich v. Cambridgeport Air. Sys.*, 26 F.3d 1187, 1191 (1st Cir. 1994) (applying *Franklin* presumption to conclude that "all appropriate relief" under Section 11 of the Occupational Safety and Health Act included money damages); *Ditulio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (holding that punitive damages were available under the Trafficking Victims Protection Act, which permits the recovery of "damages," because the court "follow[s] the

'general rule' that we should award 'any appropriate relief in a cognizable cause of action brought pursuant to a federal statute'" (quoting *Franklin*, 503 U.S. at 71)).

We disagree with the district court's decision to limit the application of the *Franklin* presumption in this case. The *Franklin* presumption need not be confined to only those cases interpreting the remedies available under an implied private right of action. To the contrary, "[t]he same presumption applies here—more so, we think, because Congress expressly stated that a claimant may obtain 'appropriate relief' against a government—the exact language used in *Franklin*." *Mack*, 839 F.3d at 303. Thus, we reject the district court's position that the *Franklin* presumption does not apply in interpreting the meaning of "appropriate relief" under RFRA.

iii. Legislative History

Although we conclude that the *Franklin* presumption extends to express private rights of action, the presumption can be rebutted. Pursuant to *Franklin*, "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," 503 U.S. at 66, and our analysis of whether Congress intended to limit the application of this general principle will vary depending on whether the right of action is implied or explicit.

Where a statutory cause of action is implied, it is futile to resort to the statutory text and legislative history, because Congress usually has not spoken about remedies applicable to a right that the federal courts, rather than Congress, created. *See id.* at 71 ("[T]he usual recourse to statutory text and legislative history . . .

necessarily will not enlighten our analysis."). Accordingly, our analysis of Congress's intent in such contexts "is *not* basically a matter of statutory construction," but rather a matter of "evaluat[ing] the state of the law when the Legislature passed [the statute]." *Id.* (emphasis in original).

On the other hand, where the private right of action is express, the statutory text and legislative history may enlighten our understanding. The question thus becomes whether these interpretative sources exhibit a "clear direction" by Congress that the federal courts lack "the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70-71. We conclude that neither the statutory text nor the legislative history provides such a clear direction here.

As noted above, the district court supported its conclusion in part by referencing legislative history indicating that RFRA was intended solely to reverse the Supreme Court's decision in *Smith*. *See Tanvir*, 128 F. Supp. 3d at 778-80. For instance, the Senate Committee Report, which discusses the background and purpose for RFRA, states that "the purpose of this act is only to overturn the Supreme Court's decision in *Smith*," S. Rep. No. 103-111, at 12 (1993), and by doing so restore the compelling interest test to free exercise claims, *id.* at 8. The House Committee Report similarly focuses on the effect of the *Smith* decision and the resulting outcome that free exercise claims receive the "the lowest level of scrutiny employed by the courts." H.R. Rep. No. 103-88, at 5-6 (1993).

The Senate and House Committee Reports, however, are not conclusive as to the meaning of RFRA's statutory text. The statutory text of RFRA reflects a dual purpose: "to restore the compelling interest test" applied by the Supreme Court in free exercise cases before *Smith*, and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). In accomplishing the latter purpose, Congress also codified a statutory cause of action to bring claims against officials in their individual capacities—a type of action never explicitly authorized (or foreclosed) by the Supreme Court's free exercise jurisprudence. Congress accordingly went beyond merely restoring the compelling interest test. It removed ambiguity about who could be held liable for violations of religious exercise.[13]

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[13] The Supreme Court also has indicated that RFRA's least restrictive means requirement may well have gone beyond what was required by its pre-*Smith* decisions. *See City of Boerne*, 521 U.S. at 509 ("[T]he least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify."); *see also Hobby Lobby*, 134 S. Ct. at 2761 n.3 (observing that *City of Boerne* reflects an understanding that RFRA's least restrictive means requirement "provided even broader protection for religious liberty than was available under those [pre-*Smith*] decisions"); *id.* at 2767 n.18 (declining to decide whether RFRA's least restrictive means requirement in fact "went beyond what was required by our pre-*Smith* decisions"); *id.* at 2793 (Ginsburg, *J.,* dissenting) ("Our decision in *City of Boerne*, it is true, states that the least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify. As just indicated, however, that statement does not accurately convey the Court's pre-*Smith* jurisprudence.") (internal quotation marks and citation omitted). If RFRA's least restrictive means requirement in fact went beyond pre-*Smith* jurisprudence, such an

The legislative history further fails to provide an "express[]" and "clear direction" that Congress intended to preclude litigants from seeking damages in these individual capacity suits. *Franklin*, 503 U.S. at 66, 70. To be sure, the House and Senate Committee Reports each contain similar language stating, "[t]o be absolutely clear, the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to *Smith*." H.R. Rep. No. 103-88, at 8; *see also* S. Rep. No. 103-111, at 12 ("To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court[']s[] free exercise jurisprudence under the compelling governmental interest test prior to *Smith*."). It does not follow, however, that Congress therefore intended to limit the remedies available for RFRA violations.

As an initial matter, the broader legislative history shows that the House and Senate Committee Reports were not using the term "relief" to refer to remedies. Rather, the reports were concerned with claimants bringing particular causes of action. *See generally* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 236-39 (1994). During the House and Senate hearings, several religious and social organizations raised concerns that claimants would use RFRA to challenge restrictions on

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extension further supports our holding that RFRA provides an individual damages remedy. We need not decide this dispute today, however, because our holding remains the same in light of RFRA's statutory text and legislative history.

abortion, tax exemptions, and government funding for religious organizations.[14] These concerns were sufficiently serious that several key Republican representatives withdrew their support for the bill and introduced legislation that explicitly prohibited claimants from using the statute to affect those issues. *Id.*; *see also* H.R. 4040, 102d Cong. § 3(c)(2) (1991).

RFRA's lead sponsors subsequently agreed to compromise language in the House and Senate Committee Reports addressing these concerns, and made clear that the act "does not expand, contract or alter the ability of a claimant to obtain relief" in accordance with the federal courts' free exercise jurisprudence. Laycock & Thomas, *supra*, at 236-39; *see also* S. Rep. No. 103-111, at 12; H.R. Rep, No. 103-88, at 8. The reports accordingly stated that claims challenging abortion restrictions should be adjudicated pursuant to the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and that the bill does "not change the law" determining whether religious organizations may receive public funding or enjoy tax exemptions. S. Rep. No. 103-111, at 12; HR, Rep. No. 103-88, at 8. Taken in context, it is thus clear that

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[14] *See Religious Freedom Restoration Act of 1991: Hearings on HR. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 33-35, 40-43 (1992) (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference); *id.* at 270-301 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.); *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Sen. Comm. on the Judiciary*, 102d Cong., 99-115 (1992) (statement of Mark E. Chopko, Gen. Counsel, United States Catholic Conference); *id.* at 203-37 (statement of James Bopp, Jr., Gen. Counsel, National Right to Life Committee, Inc.).

Congress was not concerned with limiting plaintiffs' available remedies under the act—it was concerned with preventing plaintiffs from pursuing certain causes of action.[15]

Moreover, even if the compromise language in the House and Senate Committee Reports could be read as excluding certain remedies from RFRA's scope, it does not clearly indicate that Congress intended to exclude an individual damages remedy. As previously noted, the Senate Committee Report states that the act does not "alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts'[] free exercise jurisprudence . . . prior to *Smith*." S. Rep. No. 103-111, at 12. The Supreme Court, in turn, never ruled out the possibility of plaintiffs' bringing individual damages claims for free exercise violations before *Smith* was decided. To the contrary, in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that victims of Fourth Amendment violations could pursue individual damages claims against officials, and it extended this

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[15] The floor debate likewise confirms that Congress intended to limit the causes of action that could be brought under the statute. Representative Henry Hyde stated that he had offered amendments to RFRA because he was concerned that the legislation would "create an independent statutory basis" for individuals to challenge restrictions on abortion, social service programs operated by religious institutions with public funds, and the tax-exempt status of religious institutions. 139 Cong. Rec. 103, 9682 (1993). Representative Hyde further stated that his concerns were "resolved either through explicit statutory changes or through committee report language," which "ma[de] clear" that "such claims are not the appropriate subject of litigation" under RFRA, and that the "bill does not expand, contract, or alter the ability of a claimant to obtain relief" consistent with free exercise jurisprudence prior to *Smith*. *Id.*

principle in *Carlson v. Green*, 446 U.S. 14, (1980), to permit individual damages claims for constitutional violations unless the defendants could show that Congress "provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution," or there are "special factors counseling hesitation in the absence of affirmative action by Congress," *id.* at 18-19 (emphasis omitted). It was therefore at least possible at the time that Congress passed RFRA that an individual damages claim would have been available for a free exercise violation. Given this potential, we cannot say that the Senate Committee Report expressly intended to exclude such a remedy when it stated that it did not intend to "expand" or "alter" claimants' ability to obtain relief. S. Rep. No. 103-111, at 12.[16]

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[16] To be sure, the Supreme Court has subsequently shown "caution toward extending *Bivens* remedies into any new context," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001), and "[s]ince *Carlson* in 1980, the Supreme Court has declined to extend the *Bivens* remedy in any new direction at all," *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009). This trend, however, was not clearly apparent at the time of RFRA's passage because the Court had recognized *Bivens* claims in three instances and denied such claims in four. *See id.* at 571-72. Additionally, although the Supreme Court in *Bush v. Lucas*, 462 U.S. 367, 368 (1983), held that federal employees could not bring *Bivens* claims against their superiors, the decision was narrow, and based on federal employees' existing access to "an elaborate remedial system" that protected their constitutional rights, *id.* at 388. That remedial framework is not applicable here, because the plaintiffs are not federal employees. Moreover, even if the trend away from extending *Bivens* were obvious when RFRA was passed, it still falls short of the Supreme Court's clearly foreclosing an individual damages remedy for free exercise violations. We therefore conclude that it would not be a basis for finding the *Franklin* presumption inapplicable here.

Furthermore, even if the Senate Committee Report could be read to limit RFRA's remedies to those explicitly authorized by the Supreme Court prior to *Smith*, the approach of the House Committee Report is not necessarily so narrow. Unlike the Senate Committee Report, which authorizes relief "consistent with the Supreme Courts'[] free exercise jurisprudence," S. Rep. No. 103-111, at 12, the House Committee Report authorizes relief so long as it is "consistent with free exercise jurisprudence, including Supreme Court jurisprudence," H.R. Rep. No. 103-88, at 8. The House Committee Report therefore appears to have contemplated providing a broad array of relief consistent not only with Supreme Court jurisprudence but that of the lower courts as well. We thus find it highly relevant that at the time of RFRA's passage, several Courts of Appeals had held that plaintiffs could pursue individual damages claims for violations of their free exercise rights. *See Caldwell v. Miller*, 790 F.2d 589, 607-608 (7th Cir. 1986); *Jihaad v. O'Brien*, 645 F.2d 556, 558 n.1 (6th Cir. 1981); *see also Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) (holding that *Bivens* claims are broadly available for First Amendment violations); *Scott v. Rosenberg*, 702 F.2d 1263, 1271 (9th Cir. 1983) (assuming, without deciding, that the plaintiff could recover damages if his free exercise rights had been violated).

Accordingly, we do not believe that the legislative history evinces a clear and express indication that Congress intended to exclude individual damages claims from the scope of RFRA's available relief, and we therefore conclude that the *Franklin* presumption is applicable.

VI. Qualified Immunity

Having held that RFRA authorizes a plaintiff to sue federal officers in their individual capacities for money damages, we consider whether those officers should be shielded by qualified immunity.

At the panel's request, the parties submitted supplemental briefing addressing two questions: (1) "whether, assuming *arguendo* that RFRA authorizes suits against officers in their individual capacities, [Defendants] would be entitled to qualified immunity," and (2) "whether *Ziglar v. Abbasi*, No. 15-1358, 2017 WL 2621317 (June 19, 2017), applies in any relevant way to this question or the other questions presented in this appeal." Order, *Tanvir v. Tanzin*, No. 16-1176 (2d Cir. 2017), Dkt. No. 83; *see also* Post-Argument Ltr. Brs., *Tanvir v. Tanzin*, No. 16-1176 (2d Cir. 2017), Dkt Nos. 89-90, 93-94.

We are sensitive to the notion that qualified immunity should be resolved "at the earliest possible stage in the litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Indeed, we have, in some circumstances, "permitted the [qualified immunity] defense to be successfully asserted in a Rule 12(b)(6) motion." *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004). Nevertheless, as a general matter, "[i]t is our practice in this Circuit when a district court fails to address the qualified immunity defense to remand for such a ruling." *Eng v. Coughlin*, 858 F.2d 889, 895 (2d Cir. 1988) (citing *Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir. 1988)).

Here, the district court decision below did not address whether Defendants were entitled to qualified immunity. Similarly, until the panel prompted the parties at oral argument and in its post-argument order,

neither side fully addressed or briefed the issue of qualified immunity on appeal. In the absence of a more developed record, we decline to address in the first instance whether the Defendants are entitled to qualified immunity. We remand to the district court to make such determination in the first instance.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 16-1176

MUHAMMAD TANVIR, JAMEEL ALGIBHAH,
NAVEED SHINWARI, PLAINTIFFS-APPELLANTS

v.

FNU TANZIN, SPECIAL AGENT, FBI; SANYA GARCIA, SPECIAL AGENT, FBI; JOHN LNU, SPECIAL AGENT, FBI; FRANCISCO ARTUSA, SPECIAL AGENT, FBI; JOHN C. HARLEY III, SPECIAL AGENT, FBI; STEVEN LNU, SPECIAL AGENT, FBI; MICHAEL LNU, SPECIAL AGENT, FBI; GREGG GROSSOEHMIG, SPECIAL AGENT, FBI; WEYSAN DUN, SPECIAL AGENT IN CHARGE, FBI; JAMES C. LANGENBERG, ASSISTANT SPECIAL AGENT IN CHARGE, FBI; JOHN DOE #1, SPECIAL AGENT, FBI; JOHN DOE #2, SPECIAL AGENT, FBI; JOHN DOE #3, SPECIAL AGENT, FBI; JOHN DOE #4, SPECIAL AGENT, FBI; JOHN DOE #5, SPECIAL AGENT, FBI; JOHN DOE #6, SPECIAL AGENT, FBI, DEFENDANTS-APPELLEES

[Filed: Feb. 14, 2019]

PRESENT:

ROBERT A. KATZMANN,
Chief Judge,
DENNIS JACOBS,
JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
PETER W. HALL,
DENNY CHIN,

RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
RICHARD J. SULLIVAN,
Circuit Judges.[*]

Following disposition of this appeal on June 25, 2018, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

Rosemary S. Pooler, Circuit Judge, joined by Robert A. Katzmann, *Chief Judge*, concurs by opinion in the denial of rehearing *en banc*.

Dennis Jacobs, *Circuit Judge*, joined by José A. Cabranes and Richard J. Sullivan, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

José A. Cabranes, Circuit Judge, joined by Dennis Jacobs and Richard J. Sullivan, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

[*] Circuit Judge Debra Ann Livingston recused herself from these proceedings.

ROBERT A. KATZMANN, *Chief Judge*, and ROSEMARY S. POOLER, *Circuit Judge*, concurring in the denial of rehearing *en banc*:[1]

Our dissenting colleagues do their level best to disguise the panel's opinion as an extension of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). They claim that despite the Supreme Court's recent decisions restraining *Bivens* actions, the panel's opinion effectively dabbles in the now-forbidden practice of implying private rights of action. Dissent from the Denial of Rehearing En Banc (Jacobs, *J.*), slip op. at 5; Dissent from the Denial of Rehearing En Banc (Cabranes, *J.*), slip op. at 1-2. But these arguments deny an incontrovertible truth: the panel's opinion does not imply a private right of action. To the contrary, RFRA contains an *express* private right of action with an *express* provision for "appropriate relief." *See* 42 U.S.C. § 2000bb-1(c).[2] The panel opinion interprets RFRA's express private right of action to support a damages remedy where appropriate—

[1] Pursuant to Second Circuit En Banc Protocol 12, Judge Gerard E. Lynch, although a member of the panel that decided this case, is a Senior Judge and thus may not report his views on the petition for rehearing en banc.

[2] RFRA's private right of action in its entirety states:

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1(c).

a conclusion based on principles of statutory interpretation that *Bivens* and its progeny do not touch.

Separation of powers considerations compel the judiciary to exercise "caution with respect to actions in the *Bivens* context, where [an] action is implied to enforce the Constitution itself." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017). Undoubtedly, the Supreme Court's hesitancy to apply *Bivens* to new contexts reflect a concern for judicial absorption of legislative power: "[T]he inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. The Court suggests that Congress is typically the best-suited institution to resolve the "host of considerations that must be weighed and appraised" in deciding whether a remedy for constitutional or statutory rights exists. *Id.* at 1857 (internal quotation marks omitted).

But despite our dissenting colleagues' protests, the Court's reasoning in *Ziglar* is inapplicable to the question of whether Congress's provision in RFRA for litigants to "obtain appropriate relief against a government," 42 U.S.C. § 2000bb-1(c), contemplates a damages remedy. *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 65-66 (1992) ("[T]he question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists in the first place." (internal quotation marks omitted)). In the context of an implied remedy, the *Ziglar* Court instructed that the answer to this question is that Congress typically decides "whether to provide for a damages remedy." 137 S. Ct. at 1857.

This truism recognizes that the judiciary's power to impose liability by creating a private right of action vis-à-vis Congress's silence is modest. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975) (defining four searching requirements for implying a private right of action). By contrast, in the context of a private right of action, Congress has already spoken to impose liability and thereby bestows the judiciary with greater power to effect a remedy. *E.g.*, *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."). The role of the court in this case is different because implying a right of action is a judicially constructed remedy, whereas interpreting a statute to provide a damages remedy is a time-honored exercise of the judiciary's power to grant relief where Congress has legislated liability.

This makes sense. While it would upset the separation of powers for federal courts "to award remedies when the Constitution or laws of the United States do not support a cause of action," if federal courts declined to recognize remedies for express causes of action, it "would harm separation of powers principles in another way, by giving judges the power to render inutile causes of action authorized by Congress." *Franklin*, 503 U.S. at 74. Thus, the opinion, rather than narrowly skirting the Supreme Court's *Bivens* jurisprudence (as the dissents from rehearing darkly imply), recognizes the Court's power where separation of powers concerns are weakest.

It is therefore axiomatic that the judiciary's interpretation of "appropriate relief" as prescribed in an express right of action is not akin to a *Bivens* action. Unlike a *Bivens* action, where the Court itself implies a cause of action, *Tanvir* considers the scope of an express right of action with an express provision of remedies from Congress. This distinction is critical, and no sleight of the law can elide *Bivens* and the judiciary's power to interpret statutes.

The opinion stands on its own to address the dissents' remaining arguments. We write separately merely to expose the dissents' *Bivens* accusations as a red herring.

DENNIS JACOBS, *Circuit Judge*, joined by JOSÉ A. CABRANES and RICHARD J. SULLIVAN, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

Plaintiffs allege that they were placed on the national "No Fly List," though they posed no threat to aviation, in retaliation for their refusal to become FBI informants reporting on fellow Muslims. The claim is that the retaliation they suffered substantially burdened their exercise of religion, in violation of the Religious Freedom Restoration Act ("RFRA"), because their refusal was compelled by Muslim tenets.

The sufficiency of such a claim is not at issue on appeal; so the only issue is whether RFRA affords a money-damages remedy against federal officers sued in their individual capacities. The panel opinion argues that: the statute permits "appropriate relief against a government"; a government is defined to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law)"; money damages is presumptively "appropriate relief"; and therefore money damages is appropriate relief against individual officers.

Because the panel's reasoning fails as a matter of law and logic and runs counter to clear Supreme Court guidance on this subject, I would grant *in banc* review and reverse the panel's erroneous creation of a right to money damages under RFRA. Indeed, the panel's expansive conclusion could be viewed without alarm only by people (judges and law clerks) who enjoy absolute immunity from such suits.

I

RFRA states in relevant part that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). As to whether this statute affords a money-damages remedy against individual federal officers, precedent points the way with graphic simplicity.

This Court has already decided the scope of an identical private right of action in the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). RLUIPA and RFRA alike forbid substantial burdens on religious exercise: RLUIPA applies to the states, while RFRA applies to the federal government. We held that the phrase "appropriate relief against a government" in RLUIPA does not create a private right of action against state officials sued in their individual capacities. *Washington v. Gonyea*, 731 F.3d 143, 146 (2d Cir. 2013). *Washington* is fully consistent with the Supreme Court's ruling that RLUIPA does not authorize private suits for money damages against the states themselves. *Sossamon v. Texas*, 563 U.S. 277, 293 (2011).

The district court followed these precedents. The panel opinion labors to distinguish them. To distinguish *Washington* and *Sossamon*, the panel opinion emphasizes that they were informed by Congress's Spending Clause powers and by state sovereign immunity (respectively), considerations not present here. But in *Sossamon*, the Supreme Court relied not on sovereign immunity alone, but on the plain meaning of the text. The Court explained that the phrase "appropriate relief" takes its meaning from "context." *Sossamon*, 563 U.S.

at 286. In RLUIPA (as in RFRA) the context is clear: the full phrase is "appropriate relief against a government." As the Supreme Court explained, "[t]he context here—where the defendant is a sovereign—suggests, if anything, that monetary damages are not 'suitable' or 'proper.'" *Id.* Given that RFRA and RLUIPA attack the same wrong, in the same way, in the same words, it is implausible that "appropriate relief against a government" means something different in RFRA, and includes money damages.

As the panel opinion concedes, "RLUIPA borrows . . . an express private cause of action that is taken from RFRA"; "[a]s a result, courts commonly apply RFRA case law to issues arising under RLUIPA and vice versa." Op. 31 n.8 (internal quotation marks omitted). And the holding in *Washington*—that RLUIPA creates no private right of action against state officials in their individual capacities—was reached "as a matter of statutory interpretation." 731 F.3d at 146.

The panel opinion deems it significant that RFRA's definition of "government" includes an "official (or other person acting under color of law)." The use of language similar to that found in 42 U.S.C. § 1983, the panel argues, suggests personal liability for money damages under RFRA. This argument is self-defeating. First, the inclusion of the word "official" in the definition of "government" would be required simply to facilitate injunctive relief; it therefore tells us nothing about damages. Moreover, Congress's use of a *definition* similar to that found in § 1983 only highlights the fact that Congress declined to enact *relief* similar to that found in § 1983. RFRA contains nothing akin to § 1983's explicit endorsement of suits for money damages ("shall be

liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . ."). Surely this was not a careless oversight.

The panel opinion also fails to account adequately for the limiting term "appropriate relief," which "is open-ended and ambiguous about what types of relief it includes." *Sossamon*, 563 U.S. at 286. "Far from clearly identifying money damages, the word 'appropriate' is inherently context-dependent," *Sossamon*, 563 U.S. at 286, and we must therefore consider what forms of relief may be appropriate against different persons defined in RFRA as components of government.

The reading of RLUIPA is easily extended to the reading of RFRA. The District of Columbia Circuit recognized in *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006), that "appropriate relief against a government" in RFRA does not include money damages against the federal government—just as the Supreme Court in *Sossamon* later read the same wording in RLUIPA to foreclose a money damages award against a state. I would follow suit, and align this case, which considers personal damages awards under RFRA, with our *Washington* precedent on personal damages awards under RLUIPA.

As the district court opinion observed, "every other federal statute identified by Plaintiffs as recognizing a personal capacity damages action against federal officers . . . includes specific reference to the availability of damages." *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 778 (S.D.N.Y. 2015) (subsequent history omitted). The omission of any such language in RFRA is telling, and in my view conclusive.

II

Proceeding backwards, the panel opinion observes that RFRA's legislative history does not evince "a clear and express indication that Congress intended to *exclude* individual damages claims from the scope of RFRA's available relief." Op. 55 (emphasis added). Maybe; but the absence of such an indication does not support a positive inference. The opinion's (lame) conclusion is that it was "at least possible at the time that Congress passed RFRA that an individual damages claim would have been available for a free exercise violation." Op. 53.

If a statute imposes personal damages liability against individual federal officers, one would expect that to be done explicitly, rather than by indirection, hint, or negative pregnant. There is no such explicit wording in RFRA because the manifest statutory purpose has nothing to do with such a remedy. The Religious Freedom Restoration Act was enacted to restore religious freedom that Congress believed had been curtailed by *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that under the First Amendment no compelling government interest is required to justify substantial burdens on religious exercise imposed by laws of general application.

As the panel opinion concedes, RFRA's legislative history was "absolutely clear" that "the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*." Op. 50 (internal quotation marks omitted). The panel opinion fails to draw the obvious inference: in the Supreme Court's free exercise jurisprudence pre-*Smith*, the Court had

never held that damages against the government for First Amendment violations were available—let alone personal damages against individual federal officers. That is unsurprising given the default principle that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996).

III

To support the idea that RFRA provides a personal damages remedy against individual officers, the panel relies on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). *Franklin*, however, does not create a presumption in favor of money damages; rather, it simply recognizes a presumption (in the absence of contrary indication) that a private right of action is enforced by all "appropriate" remedies. That of course simply begs the question. Indeed, RFRA itself *already* speaks of "appropriate relief"; so *Franklin* provides no new information. In other cases, of course, the Supreme Court has offered guidance regarding whether money damages are generally considered appropriate relief against governments and government officials. Its answer is no. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017); *Sossamon*, 563 U.S. at 286.

In any event, the *Franklin* presumption was created in the context of an *implied* right of action "[w]ith no statutory text to interpret." *Sossamon*, 563 U.S. at 288. That presumption is held in *Sossamon* to be "irrelevant to construing the scope of an express waiver of sovereign immunity." *Id.* The waiver of sovereign immunity in RFRA is of course "express."

The panel opinion detects irony in a rule that may presume a broader set of remedies in an implied right of action than in a right of action that is express. But irony is dispelled when one considers that implied rights of action for damages against individual federal officers —*i.e.*, *Bivens* actions—are not in vogue; they are tolerated in the few existing contexts, and may never be created in any other context whatsoever. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("[W]e have consistently refused to extend *Bivens* liability to any new context or new category of defendants."); *see also Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (in banc).

The panel has done what the Supreme Court has forbidden: it has created a new *Bivens* cause of action, albeit by another name and by other means. The Supreme Court did not shut the *Bivens* door so that we could climb in a window. The panel ignores the considerations that inform the Supreme Court's refusal to extend *Bivens*. A private right of action for money damages against individual officers of "a government" entails "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). We must consider "the burdens on Government employees who are sued personally," and the "costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies." *See Ziglar*, 137 S. Ct. at 1858.

The remedy created by the panel opinion is considerably more inhibiting than the personal damages remedy in the context of 42 U.S.C. § 1983, which is mitigated by

qualified immunity. The panel opinion mentions (without deciding) that qualified immunity may be available as possible mitigation. Mitigation of error is always encouraging, and I have no doubt that qualified immunity does apply here. Indeed, I have difficulty imagining a scenario in which its applicability would be more apparent: the defendants here are FBI agents pursuing a national security investigation, and were never told that Plaintiffs believed cooperating with an investigation "burdened their religious beliefs." Yet a court's finding of qualified immunity is never a foregone conclusion, and many courts—including our own—have occasionally failed to apply it when appropriate. *See, e.g.*, *Iqbal v. Hasty*, 490 F.3d 143, 153 (2d Cir. 2007). The panel's remand on this issue sows doubt where there should be none.

With or without qualified immunity, such liability would result in federal policy being made (or frozen) by the prospect of impact litigation. The safest course for a government employee in doubt would be to avoid doing one's job, which is not a choice in need of encouragement.

* * *

I respectfully dissent from the denial of *in banc* review because the panel opinion is quite wrong and actually dangerous.

JOSÉ A. CABRANES, *Circuit Judge*, joined by DENNIS JACOBS and RICHARD J. SULLIVAN, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

I fully join Judge Jacobs' thorough dissent, which does the heavy lifting on the merits. I write separately simply to emphasize that the panel decision represents a transparent attempt to evade, if not defy, the precedents of the Supreme Court.

For nearly half a century, the Supreme Court has "consistently rejected invitations" to extend the *Bivens* remedy to new contexts. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Yet twelve years ago, in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), a panel of our Court entertained the extension of *Bivens* to several such contexts, including violations of the Free Exercise clause. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court forcefully reversed, reminding us not to "extend *Bivens* liability to any new context or new category of defendants" including "an implied damages remedy under the Free Exercise Clause." *Id.* at 675 (internal quotation marks omitted).

Nevertheless, four years ago, there was another attempt to evade the Supreme Court's clear instruction. In *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), a panel of our Court sought to extend the *Bivens* remedy to the extraordinary case of officials implementing national security policy. A motion to rehear the case *en banc* failed by vote of an evenly divided court (6-6). *See* 808 F.3d 197 (2d Cir. 2015). Once again, however, the Supreme Court intervened, reining in our Court's misplaced enthusiasm for creating official liability *ex nihilo*. *See Ziglar v. Abbasi,* 137 S. Ct. 1843 (2017).

In *Ziglar*, the Supreme Court not only reversed us, but patiently explained *why* damages remedies against government officials are disfavored and should not be recognized absent explicit congressional authorization: "Claims against federal officials often create substantial costs, in the form of defense and indemnification . . . time and administrative costs . . . resulting from the discovery and trial process." *Id.* at 1856. These costs, the Supreme Court instructed, provide "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1858. Thus "courts must refrain from creating the remedy in order to respect the role of Congress." *Id.*

It appears our Court is still incapable of learning this lesson. In the instant case, however, we have developed still another rationalization for avoiding the Supreme Court's instruction. "We are not extending *Bivens*," the panel in effect insists. "We are simply presuming that Congress legislated a *Bivens*-like remedy—*sub silentio*—in enacting RFRA."

This rationalization is as flawed as it is transparent. Insofar as this panel suggests we may assume that Congress authorized such damages implicitly, *Ziglar* reminds us that "Congress will be explicit if it intends to create a new private cause of action" or "substantive legal liability," particularly for government officials. *Id.* at 1856-57. Insofar as the panel suggests that Congress incidentally legislated such a remedy—as part of its general intent to restore the Free Exercise legal structure antedating *Employment Division v. Smith*, 494 U.S. 872 (1990)—*Iqbal* makes clear that damages are not, and never have been, available for Free Exercise claims. 556 U.S. at 676.

In sum, RFRA reveals no Congressional intent to create a damages remedy, and on no theory may we presume it.

When asked why he persisted in issuing decisions that the Supreme Court would predictably overturn, a prominent judge of another circuit once explained, "[t]hey can't catch 'em all."[1] Such an attitude is not, and must not become, the approach of our Circuit.

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[1] Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift,* N.Y. TIMES, April 12, 2018, https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html.

APPENDIX C

UNITED STATES DISTTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 13-CV-6951 (RA)

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, NAVEED SHINWARI, AND AWAIS SAJJAD, PLAINTIFFS

v.

LORETTA E. LYNCH, ATTORNEY GENERAL, JEH C. JOHNSON, SECRETARY OF HOMELAND SECURITY, JAMES COMEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, CHRISTOPHER M. PIEHOTA, DIRECTOR, TERRORIST SCREENING CENTER, FNU TANZIN, SANYA GARCIA, FRANCISCO ARTUSA, JOHN LNU, MICHAEL RUTOWSKI, WILLIAM GALE, JOHN C. HARLEY III, STEVEN LNU, MICHAEL LNU, GREGG GROSSOEHMIG, WEYSAN DUN, JAMES C. LANGENBERG, AND JOHN DOES 1-13, DEFENDANTS

[Filed: Sept. 3, 2015]

OPINION & ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari, and Awais Sajjad bring this suit to remedy alleged violations of their constitutional and statutory rights. Each is either a lawful permanent resident or citizen of the United States, and each is Muslim. They claim that as part of the U.S. Government's

efforts to bolster its intelligence gathering in the aftermath of the terrorist attacks of September 11, 2001, they were asked to become informants by agents of the Federal Bureau of Investigation (FBI). When they refused because, among other things, serving as informants would contradict their sincerely held religious beliefs, they say the Government retaliated against them by placing or maintaining their names on its "No Fly List," even though they posed no threat to aviation security. Since then, each Plaintiff claims to have been denied a boarding pass on at least one occasion, leaving him unable to visit loved ones who live abroad. To redress this alleged violation of their rights, Plaintiffs filed a Complaint against numerous federal officials, including Attorney General Loretta E. Lynch, Secretary of Homeland Security Jeh C. Johnson, FBI Director James B. Comey, and 25 named and unnamed FBI and Homeland Security agents.

Plaintiffs seek relief on two bases. First, they seek injunctive and declaratory relief against all of the defendants in their official capacities. These claims arise under the First and Fifth Amendments of the Constitution, the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 706, and the Religious Freedom Restoration Act (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* Plaintiffs assert that these constitutional and statutory provisions entitle them to an order from this Court requiring the Government to halt its alleged investigative tactics and to create fair procedures governing who is placed on the No Fly List and how such individuals may contest their inclusion. Second, Plaintiffs also seek compensatory and punitive damages from each of the individual agent defendants in their personal capacities.

They argue that they are entitled to such monetary relief under the First Amendment and RFRA.

As explained in further detail below, the official capacity claims were stayed at the request of the parties on June 10, 2015, two days after the Government advised Plaintiffs that it knew of "no reason" why they would be unable to fly in the future. The personal capacity claims, however, remain active. This opinion concerns only those claims and, more specifically, resolves a motion bought by all but two of the individual agents ("Agents"), who seek to dismiss the personal capacity claims against them.[1] The Agents argue, among other things, that the remedy Plaintiffs seek from them—money damages from each of the agents personally—is unavailable as a matter of law. For the reasons that follow, the Court agrees and will grant the Agents' motion.

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[1] Pursuant to the Stipulation and Order filed July 24, 2014, *see* Dkt. 30, Defendants FNU (*i.e.*, first name unknown) Tanzin, John LNU (*i.e.*, last name unknown), Steven LNU, Michael LNU and John Does 1-6 and 9-13 are currently proceeding under the pseudonyms specified in the First Amended Complaint, Dkt. 15. John Doe 2 is currently proceeding as John Doe 2/3. This motion is not brought by John Does 7 and 8 because the Government to date has not been able to identify those Defendants and, accordingly, they have not been served. On December 18, 2014, the Court extended Plaintiffs' time to serve John Does 7 and 8 through 30 days after a decision on this motion. *See* Dkt. 78.

BACKGROUND[2]

A. Plaintiffs' Factual Allegations

Plaintiffs claim that they are "among the many innocent people" who have been "swept up" in the years since 9/11 by the U.S. Government's "secretive watch list dragnet." ¶ 4. Although they acknowledge that the No Fly List is a critical national security tool meant to ensure that individuals believed to be threats to aviation security are not allowed to board airplanes, ¶¶ 2, 40, Plaintiffs argue that the process for placing individuals on the No Fly List is "shrouded in secrecy and [thus] ripe for abuse," ¶ 63. Plaintiffs contend their names are on the No Fly List only because they are the victims of abusive—and illegal—investigative tactics. And they say that they were unable to do anything about their unjust inclusion because of the pervasive secrecy surrounding the List.

The No Fly List is a database compiled and maintained by the Terrorist Screening Center (TSC), an agency within the FBI. ¶ 40. Federal agencies may "nominate" individuals for inclusion in the Government's various terrorist databases, including the No Fly List, if there is a "reasonable suspicion" that they are "known or suspected terrorist[s]." ¶ 41. An individual should only be placed on the No Fly List if there is additional "derogatory information" showing that he

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[2] The facts as alleged by Plaintiffs are drawn from their Complaint. All citations in this opinion preceded by "¶" or "¶¶" refer to paragraphs of the Complaint. For purposes of this motion, the Court must accept Plaintiffs' allegations as true. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

"pose[s] a threat of committing a terrorist act with respect to an aircraft." ¶ 42. Anyone whose name is on the list is barred from boarding a flight that starts or ends in the United States, or flies over any part of the country. ¶ 44. Beyond this, however, little is known about the No Fly List. ¶ 43. Although they do not have information about its exact size, Plaintiffs assert that the List has grown more than six times over from roughly 3,400 names in 2009 to over 21,000 in 2012. ¶ 47. The TSC itself has found that "many" of these thousands of individuals were placed on the No Fly List even though they did not qualify. ¶ 48. For example, a federal district court in California recently concluded that a Muslim doctoral student at Stanford was placed on the No Fly List because an FBI agent checked the wrong boxes on a nominating form. ¶ 49 (*citing Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014)).

Plaintiffs claim that each of the federal agents named in this suit, instead of utilizing the No Fly List based on legitimate information for legitimate purposes, have "exploited the significant burdens imposed by the No Fly List, its opaque nature and ill-defined standards, as well as its lack of procedural safeguards, in an attempt to coerce Plaintiffs into serving as informants within their American Muslim communities and places of worship." ¶ 8. Plaintiffs further allege that higher-level officials—including the Attorney General, Secretary of Homeland Security, and Director of the FBI—"promulgated, encouraged and tolerated a pattern and practice of aggressively recruiting and deploying informants in American Muslim communities." ¶ 67.

Although the details of each of the four Plaintiffs' experiences with the No Fly List are different, they follow

the same broad contours. Each man was born into the Islamic faith in a foreign country where at least some of his family members remain. Each legally immigrated to this country and is now lawfully present here, either as a citizen or permanent resident. Each claims he was asked to become an informant for the FBI and to share what he learned by, for example, traveling abroad to Pakistan or Afghanistan, participating in online Islamic forums, or attending certain mosques. Each declined to do so. Each was placed or kept on the No Fly List and thus was unable to fly for sustained periods over several years, unable to see loved ones. Yet each asserts that he does not—and has never—posed a threat to aviation security. Rather, each maintains that the Agents worked together to add or keep his name on the No Fly List because he refused to serve as an informant for the FBI.

In light of the manner in which the Court resolves this motion, the specific details of each Plaintiff's claims need not be discussed in detail. Some discussion, however, is warranted, and Tanvir's story is illustrative. He is a lawful permanent resident who presently lives in Queens, New York. ¶ 68. His wife, son, and parents remain in Pakistan. *Id.* In February 2007, Tanvir alleges that FBI Special Agents FNU Tanzin and John Doe 1 approached him at the dollar store in the Bronx where he then worked. ¶ 69. He was questioned for roughly 30 minutes about an old acquaintance whom the agents believed had entered the country illegally. *Id.* Nothing else about that interaction appears to have been remarkable. Two days later, however, Tanvir heard again from Agent Tanzin, who asked whether there was anything he "could share" with the FBI concerning the American Muslim community. ¶ 70. Tanvir alleges

that he told Tanzin that he knew nothing that would be relevant to law enforcement. *Id.*

Fast-forward more than a year later to July 2008. After returning from a trip in Pakistan to visit his family, Tanvir asserts that he was detained for five hours by federal agents at John F. Kennedy International Airport in New York. ¶ 71. Although he was not interviewed, his passport was confiscated and he was given an appointment to pick it up on January 28, 2009, nearly six months later. *Id.* Two days before that appointment—and almost two years since they had last been in contact—Tanvir heard again from Agent Tanzin, this time joined by FBI Special Agent John Doe 2/3,[3] who visited him at his new workplace. ¶ 73. The agents asked him to accompany them to the FBI's New York field office in Manhattan. *Id.* Tanvir agreed, and once there, he was questioned for about an hour. ¶¶ 74-75. Among other things, he was asked about terrorist training camps near the village in Pakistan where he was raised and whether he had any Taliban training. ¶ 75. Tanvir denied knowledge of or attendance at any such training camps. *Id.*

Toward the end of the hour, Agents Tanzin and John Doe 2/3 told Tanvir that they recognized he was "special," "honest," and "hardworking," and that they wanted him to work as an informant for the FBI. ¶ 76. Specifically, he asserts that they asked him to travel to Pakistan and report on what he learned. *Id.* They offered to facilitate visits to the United States for his family, and to provide financial assistance for his parents in Pakistan to travel to Saudi Arabia for a religious pilgrimage. *Id.* Tanvir reiterated his earlier position:

[3] With request to John Doe 2/3's pseudonym, *see supra* note 1.

He did not want to work as an informant. ¶ 77. But the agents purportedly persisted, warning him that he would not receive his passport and that he would be deported to Pakistan if he failed to cooperate. *Id.*

Tanvir claims to have pleaded with the agents not to deport him because his family depended on him financially. ¶ 78. He also said that he feared for his safety in Pakistan if he went there as an American informant. *Id.* When the agents suggested he could work in Afghanistan instead, he responded that that too would be dangerous. *Id.* (Although Tanvir also asserts that serving as a government informant would violate the tenets of his Muslim faith, ¶ 84, he does not appear to assert that he said as much to the agents.) At the conclusion of the meeting, the agents advised Tanvir to keep thinking, and cautioned him not to discuss their conversation with anyone. ¶ 78. The next day, Agent Tanzin called Tanvir to ask whether he had changed his mind. ¶ 79. Tanvir claims that Agent Tanzin reiterated that he would be deported if he failed to cooperate. *Id.* Tanvir again declined. *Id.*

On January 28, 2009, Tanvir went to JFK Airport to retrieve his passport, as previously instructed. ¶ 80. Department of Homeland Security (DHS) officials advised him that his passport had been withheld for an investigation that had since been completed, and they returned the document to him without incident. *Id.* The next day, however, Agent Tanzin called Tanvir and told him that his passport had been returned to him because he—Agent Tanzin—had instructed DHS officials to release the passport in recognition of the fact that Tanvir was being "cooperative" with the FBI. ¶ 81.

The Complaint alleges that the FBI agents' attempts to persuade Tanvir to become an informant continued over the next three weeks. He received multiple telephone calls and visits from Agent Tanzin and John Doe 2/3 at his workplace. ¶¶ 82-83.[4] Eventually, Tanvir stopped answering their calls, and when Agents Tanzin and John Doe 2/3 visited him at his workplace to ask why, he told them that he no longer wished to speak with them. ¶ 86. They then asked him to take a polygraph. ¶ 87. When he refused, they threatened to arrest him, but did not do so once Tanvir said he would hire an attorney if they did. *Id.* Roughly six months later, in July 2009, Tanvir traveled to Pakistan to visit his wife and parents. ¶ 88. While he was abroad, Agents Tanzin and John Doe 2/3 visited his sister at her workplace in Queens and inquired about Tanvir's travel plans. *Id.* She was uncomfortable talking to the agents. *Id.*

Tanvir returned to the United States in January 2010, at which time he took a job as a long-haul trucker. ¶ 89. His new job involved driving across the country and then taking a return flight to New York. *Id.* In October 2010, while Tanvir was in Atlanta for work, he received word that his mother was visiting New York from Pakistan. ¶ 91. He booked a flight back to New York, but was advised by an airline agent at the check-in counter in Atlanta that he was not allowed to fly. *Id.* Two unknown FBI agents approached Tanvir at the airport and advised him to contact the agents who had spoken to him in New York. *Id.* They then drove him to a nearby bus station. *Id.* While waiting for a bus to

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[4] Plaintiffs advise that the Complaint "may" have incorrectly identified John Doe 2/3 as John Doe 1 in these paragraphs of the Complaint. *See* Pls. Mem. at 10 n.6.

New York, Tanvir called Agent Tanzin, who advised Tanvir that he was no longer assigned to Tanvir. ¶ 92. Agent Tanzin told him, however, that other agents would be contacting him soon and that he should "cooperate." *Id.* These interactions led Tanvir to believe that Agents Tanzin and John Doe 1-3 placed him on the No Fly List "at some time during or before October 2010 because he refused to become an informant against his community and refused to speak or associate further with the agents." ¶ 90. His bus trip home to New York took approximately 24 hours. ¶ 93.

Two days after he returned to New York from Atlanta, the Complaint alleges that FBI Special Agent Sanya Garcia contacted Tanvir, telling him that she would assist him in getting off the No Fly List if he met with her and answered her questions. ¶ 94. Tanvir told Garcia that he had already answered the FBI's questions and declined to meet with her. *Id.* Recognizing that he was still unable to fly, Tanvir eventually quit his job as a truck driver because he could no longer take a flight back to New York after completing his deliveries. ¶ 95. On September 27, 2011, he filed a complaint with the DHS Traveler Redress Inquiry Program (TRIP). ¶ 97. This program provides an administrative mechanism for removing one's name from the No Fly List. ¶¶ 21, 57-61.

The month after filing his TRIP complaint, Tanvir purchased tickets for a flight to Pakistan in November 2011. ¶ 98. The day before his flight, Agent Garcia called Tanvir and told him he would not be allowed to fly unless he met with her. ¶ 99. Tanvir agreed because he needed to return to Pakistan to visit his ailing mother. ¶ 100. At that meeting, he was asked the

same questions that Agents Tanzin and John Doe 2/3 had asked previously. ¶ 101. He answered them because he wanted to see his mother. *Id.* After the meeting, the agents told him that they would obtain a one-time waiver for him to fly, but that it would take several weeks to process. ¶ 102. Tanvir begged Agent Garcia to let him fly the next day. ¶ 103. She said it might be possible, but she changed her mind the next day. ¶¶ 103-104. When they spoke the next day, Agent Garcia told Tanvir that he would not be able to fly until he submitted to a polygraph. ¶ 104. Tanvir cancelled his flight, obtaining only a partial refund from the airline. *Id.* He also hired a lawyer, whom the agents referred to the FBI's lawyers, who in turn told Tanvir's lawyer to contact TRIP. ¶¶ 105, 107. Tanvir again purchased a flight to Pakistan for travel in December 2011 in the hopes of visiting his mother, whose health continued to deteriorate. ¶ 109. He was denied boarding at the airport—the third time he was unable to fly. *Id.*

On April 16, 2012, Tanvir received a response to his TRIP complaint, about six months after having filed it. ¶ 110. The letter did not confirm that he was on the No Fly List, but stated only that "no changes or corrections are warranted at this time." *Id.* On May 23, 2012, he appealed that determination and asked the Government to provide him with the information on which it had based the determination that he could not be allowed to fly. ¶ 112.

In November 2012, Tanvir purchased another ticket to Pakistan and was again denied boarding at JFK Airport—the fourth time he was unable to fly. ¶ 113. The Complaint alleges that Tanvir and his lawyer, who had accompanied him to the airport, were approached

by an FBI agent at the check-in counter, who informed them that Tanvir would not be removed from the No Fly List until he met with Agent Garcia. *Id.*

On March 28, 2013, ten months after he had filed his TRIP appeal—and well over two years after he was first denied boarding in October 2010—Tanvir received a letter from DHS superseding its initial determination of April 16, 2012. ¶ 114. The letter stated, in part, that Tanvir's experience "was most likely caused by a misidentification against a government record or by random selection," and that the Government had "made updates" to its records. *Id.* Tanvir decided to try flying again and purchased another ticket. *Id.*

On June 27, 2013, in what was his fifth attempt to fly since being denied boarding in October 2010, Tanvir successfully boarded a flight and flew to Pakistan. ¶ 115. He does not know whether he was able to fly as a result of a one-time waiver provided by the agents or whether he had been removed from the No Fly List. *Id.* Tanvir asserts that his placement on the No Fly List forced him to quit his job as a truck driver, prevented him from visiting his sick mother in Pakistan when he wished to, and resulted in financial losses, including lost income and expenses related to airline tickets. ¶¶ 116-17. He says that he also continues to fear harassment by the FBI, which causes him and his family great distress. ¶ 116.

As noted previously, Algibhah's, Shinwari's, and Sajjad's allegations, including the nature of their interactions with the FBI, largely track those of Tanvir. *See generally* ¶¶ 118-96. As of the time this action was commenced, Algibhah had not flown since the spring of 2009, which was then the last time he saw his wife and daughters, who live in Yemen. ¶ 143. He has attempted

to fly home twice since then and was denied boarding each time. *Id.* Algibhah asserts that several of the Agents kept his name on the No Fly List even after they determined he posed no threat to aviation security so they could retaliate against him for his refusal to become an informant. ¶ 135. Shinwari was able to fly domestically in March 2014 after first being denied boarding in March 2012 while returning from Afghanistan, although he believed his name was still on the No Fly List until he was advised otherwise in June 2015. ¶ 169. He too claims that he was denied the ability to fly because he refused to become an informant. ¶ 159. Sajjad was first denied boarding in September 2012 while attempting to visit his family in Pakistan and, as of the time this motion was briefed, had not attempted to fly again since, believing his name remained on the No Fly List. ¶¶ 173, 196. Sajjad asserts that his name was kept on the No Fly List even after several of the Agents determined he had been wrongfully included as retaliation for his refusal to serve as an informant. ¶ 195.

B. Procedural History

Plaintiffs brought this action on October 1, 2013 and filed their operative Complaint on April 22, 2014. *See* Dkt. 15. On July 28, 2014, two separate motions to dismiss were filed. The first, on behalf of the Government, sought to dismiss all official capacity claims. *See* Dkt. 34.[5] The second, on behalf of the Agents, sought to dismiss all personal capacity claims. *See* Dkt. 38.

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[5] In light of the discussion below regarding the distinction between official and personal capacity claims, *see infra* at 12-14, the Court refers to the defendants sued in their official capacity as "the Government."

After briefing was completed, oral argument was scheduled for June 12, 2015.

On June 1, 2015, the Government moved to stay the official capacity claims. *See* Dkt. 89. As the Government explained, it had revised the redress procedures available through TRIP as a result of the decision in *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014), which held various aspects of the TRIP process inadequate under the Fifth Amendment's Due Process Clause and the APA. *See also Mohamed v. Holder*, No. 1:11-CV-50 AJT/MSN, 2015 WL 4394958 (E.D. Va. July 16, 2015) (same); Dkt. 85 (notice from Government describing revised TRIP procedures). Plaintiffs elected to avail themselves of these revised procedures. And because Plaintiffs did so, the Government argued a stay of Plaintiffs' official capacity claims was warranted, as those claims, which primarily challenge the original TRIP procedures, were or were likely to become moot in light of the revised TRIP procedures.

Plaintiffs initially resisted the Government's request for a stay. *See* Pls. Letter of June 3, 2015, Dkt. 91. But on June 8, 2015—less than a week before oral argument—Plaintiffs each received a letter from DHS advising them that: "At this time the U.S. Government knows of no reason you should be unable to fly. This determination, based on the totality of available information, closes your DHS TRIP inquiry." *See* Pls. Letter of June 10, 2015, Dkt. 92. In light of that development—apparently indicating that Plaintiffs are not now on the No Fly List—Plaintiffs consented to a stay of their official capacity claims. *Id.* The Court ordered such a stay and administratively terminated the official capacity motion to dismiss. *See* Dkt. 93. Only Plaintiffs'

claims against the Agents in their personal capacities remain active at this time.

DISCUSSION

A. Introduction

The difference between official capacity claims, which are not at issue in this motion, and personal capacity (sometimes called "individual" capacity claims), which are, has long been a source of confusion, *see generally Kentucky v. Graham*, 473 U.S. 159, 163-68 (1985), and some background is appropriate given the centrality of those distinctions to the claims made here. The starting point is that "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). In other words, the Government cannot be sued without its consent. That rule may bar a suit even when an action is commenced against an individual government official instead of a governmental agency "if the decree would operate against the latter," *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (*per curiam*), as is usually the case when a plaintiff seeks an order in the form of an injunction commanding or preventing some action. Such a suit is known as an "official" capacity claim because it is effectively a suit against the Government, regardless of the named party.[6]

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[6] The Supreme Court has explained that the Government is the real party in interest "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quotations omitted). That approach reflects the commonsensical observation that the Government can act

In 1976, Congress amended the APA to include a formal waiver of the United States' sovereign immunity from claims "seeking relief other than money damages" against "an agency or an officer or employee thereof . . . in an official capacity or under color of legal authority." 5 U.S.C. § 702; *see also B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 723-25 (2d Cir. 1983) (describing Congress's intention with the APA amendments to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity") (quotation omitted). As a result, sovereign immunity does not pose a barrier to claims seeking injunctive or declaratory relief against the Government and its officers when they are sued in their official capacities.

Significant for present purposes, however, neither the APA nor any other statute relevant in this context waives the Government's immunity (or the immunity of its officers sued in their official capacity) from damages claims.[7] There is no disagreement among the parties

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only through agents and thus, for example, "when the agents' actions are restrained, the sovereign itself may, through [the agents], be restrained." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). As a result, where the effect of a judgment would operate against the Government, a suit against a named federal officer "is not a suit against the official [personally] but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Because these suits are really suits against the Government, when officials sued in their official capacity die or leave office, their successors automatically assume their roles in the litigation, as Attorney General Loretta E. Lynch did in this case for former Attorney General Eric J. Holder. *See* Fed. R. Civ. P. 25(d)(1); Dkt. 93 (order substituting Lynch for Holder).

[7] The United States has, however, waived its immunity from damages in other contexts. *See, e.g.*, the Tucker Act, 28 U.S.C.

on this point. *See* Pls. Mem. at 84; Defs. Reply at 1 n.1. But this is the significance of suits against government officials in their "personal" capacities: Where an official is sued in his or her personal capacity, sovereign immunity does not apply. Unlike official capacity suits, "[p]ersonal-capacity suits . . . seek to impose *individual* liability upon a government officer for actions taken under color of [federal] law." *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (emphasis added). Because any award of money damages in such a suit (theoretically) comes from the official's own pocket, there is no concern about sovereign immunity.[8] The common-law cause of action first recognized in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983 are two mechanisms that may provide for personal capacity damages actions in the constitutional context against federal and state officers, respectively, while several federal statutes may provide for such damages in other contexts.[9]

Here, Plaintiffs seek injunctive and declaratory relief against Defendants sued in their official capacities and money damages from a subset of Defendants—namely, the Agents—in their personal capacities. *See* Pls. Mem. at 49 n.24. As resolution of the official capacity claims has been left for another day by consent of the parties,

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§§ 1346(a)(2), 1491 (certain contracts claims); *see also United States v. Mitchell*, 463 U.S. 206, 212-16 (1983) (recounting history of the Federal Government's waiver of immunity from suits for damages).

[8] As a practical matter, the Government almost always indemnifies its officials from such suits and provides representation through lawyers from the Department of Justice. *See* 28 C.F.R. § 50.15. Indeed, that is true for the Agents' representation in this case.

[9] For examples of such statutes, *see infra* at 32.

this opinion addresses only whether the specific theories by which Plaintiffs seek to recover damages from the Agents in their personal capacities are legally viable. Plaintiffs advance arguments under both *Bivens* and RFRA, a federal statute that provides for "appropriate relief" in certain situations where an individual's ability to freely exercise his faith has been substantially burdened by the Government or its agents. 42 U.S.C. § 2000bb-1(c). For the reasons that follow, neither of these two arguments ultimately succeeds.[10]

B. *Bivens* Is Unavailable in This Context

In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Although initially predicated on the traditional understanding that the existence of a right must imply a remedy, *see Bivens*, 403 U.S. at 397 (*citing Marbury v. Madison*, 1 Cranch 137, 163 (1803)), the Supreme Court has since "rejected the claim that a *Bivens* remedy should be implied simply for want of any other

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[10] The Agents also argue pursuant to Fed. R. Civ. P. 12(b)(2) that the Court lacks personal jurisdiction over multiple Agents. *See* Defs. Mem. at 61-66. After submissions from the parties concerning Plaintiffs' request for limited jurisdictional discovery in order to oppose that aspect of the Agents' motion, the Court accepted the Agents' suggestion to defer consideration of that aspect of their motion to dismiss until the balance of the motion was resolved. *See* 09/16/2014 Tr. 36, Dkt. 69. Given the holdings in this opinion, the personal jurisdiction arguments are now moot. Finally, the Agents have argued that the claims against John Does 1 and 2/3 are time-barred. *See* Defs. Mem. at 66-69. The Court need not reach that argument in light of its conclusion that no relief is available against them.

means for challenging a constitutional deprivation in federal court," *Malesko*, 534 U.S. at 69. Thus, although sometimes described as "the federal analog to suits brought against state officials under [42 U.S.C. § 1983]," *Hartman v. Moore*, 547 U.S. 250, 2545 n.2 (2006), *Bivens* is far more limited than § 1983 because "a *Bivens* remedy is not available for all who allege injury from a federal officer's violation of their constitutional rights," *Turkmen v. Hasty*, 789 F.3d 218, 234 (2d Cir. 2015). Indeed, a *Bivens* action "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances . . . a *Bivens* remedy [is] unjustified." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

A federal court asked to imply a *Bivens* remedy in 2015 must approach that task with circumspection. Although the Supreme Court has twice implied *Bivens* actions since *Bivens* itself was decided, *see Davis v. Passman*, 442 U.S. 228 (1979) (employment discrimination in violation of Due Process Clause); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment violation by prison officials), in the more than three decades since the last of the *Bivens* trilogy was decided, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Malesko*, 534 U.S. at 68; *accord Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (*en banc*) ("[T]he *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts.") (internal quotation marks omitted).

The Supreme Court's refusal to recognize a new *Bivens* action since 1980 is not for want of opportunity. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983) (federal employee's claim that his federal employer dismissed him

in violation of the First Amendment); *Chappell v. Wallace*, 462 U.S. 296 (1983) (claim by military personnel that military superiors violated various constitutional provisions); *United States v. Stanley*, 483 U.S. 669 (1987) (similar); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (claim by recipients of Social Security disability benefits that benefits had been denied in violation of the Fifth Amendment); *Meyer*, 510 U.S. 471 (former bank employee's suit against a federal banking agency, claiming that he lost his job due to agency action that violated the Fifth Amendment's Due Process Clause); *Malesko*, 534 U.S. 61 (prisoner's Eighth Amendment-based suit against a private corporation that managed a federal prison); *Wilkie*, 551 U.S. 537 (ranch owner's claim for harassment and intimidation against federal land management officials under Fourth and Fifth Amendments); *Minneci v. Pollard*, 132 S. Ct. 617 (2012) (prisoner's Eighth Amendment-based claim against employees of privately-operated federal prison).

Although the Court has on each of these occasions explained its refusal to extend *Bivens* with reasons specific to the particular context, this generation of *Bivens* jurisprudence appears rooted in the more fundamental judgment that "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act on the public's behalf." *Wilkie*, 551 U.S. at 562 (*quoting Bush*, 462 U.S. at 389); *see also* E. Chemerinsky, Federal Jurisdiction § 9.1, p. 633 (6th ed. 2011) ("There is no way to understand the law concerning *Bivens* suits except in the context of how the Court's attitudes toward such claims has changed."). Indeed, one Justice has observed that it is "doubtless correct that a broad interpretation of [*Bivens*'] rationale

would logically produce [its] application [in more contexts]," but noted that he was "not inclined (and the Court has not been inclined) to construe *Bivens* broadly." *Malesko*, 534 U.S. at 75 (Scalia, J., concurring) (emphasis in original). As a consequence, "[w]hatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated." *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (*en banc*).

Against that background, the Second Circuit's recent decision in *Turkmen*, which was handed down only days after oral argument on this motion, is instructive—and, indeed, dispositive. As in this case, *Turkmen* raised "a difficult and delicate set of legal issues concerning individuals who were caught up in the post-9/11 investigation even though they were unquestionably never involved in terrorist activity." 789 F.3d at 224. The plaintiffs in *Turkmen* were eight Muslim or Arab noncitizens who were detained by the federal government in the aftermath of 9/11. *Id.* While detained, they were, among other things, allegedly subjected to frequent physical and verbal abuse, denied copies of the Koran for weeks or months after requesting them, denied the Halal food required by their Muslim faith, and mocked by prison officials while they prayed. *Id.* at 227-28. For these alleged injuries, the plaintiffs sought, among other things, a *Bivens* remedy against various government officials under the First, Fourth, and Fifth Amendments. *Id.* at 225.

In light of the Supreme Court's—and the Second Circuit's—repeated admonitions against extending *Bivens* to new contexts, *Turkmen* carefully analyzed the context of the claims asserted by the plaintiffs there. The panel majority looked to "both the rights injured

and the mechanism of the injury." *Id.* at 234; *accord Arar*, 585 F.3d at 572 (defining context as "a potentially recurring scenario that has similar legal and factual components"). It explained that the rights injured were those secured by the First Amendment's Free Exercise Clause, the Fifth Amendment's Due Process Clause, and the Fourth Amendment's prohibition against unreasonable searches, *id.* at 235-37, while the mechanism of injury involved "punitive conditions [of confinement in a federal facility in the custody of federal officials] without sufficient cause," *id.* at 235. Significant for present purposes, although the panel determined that the combination of rights injured and mechanism of injury "st[ood] firmly within a familiar *Bivens* context" with respect to the *Turkmen* plaintiffs' Fourth and Fifth Amendment claims, *see id.* at 235, 237 (collecting cases), that was not so with respect to their First Amendment claim. With respect to that claim, "it [was] the right injured—Plaintiffs' free exercise right—and not the mechanism of injury that place[d] Plaintiffs' claims in a new *Bivens* context." *Id.* at 236. As the panel majority explained, "the Supreme Court has 'not found an implied damages remedy under the Free Exercise Clause' and has 'declined to extend *Bivens* to a claim sounding in the First Amendment.'" *Id.* (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)); *accord id.* at 268 n.3 (Raggi, J., concurring in part and dissenting in part) ("[T]he Supreme Court [has] consistently declined to extend a *Bivens* remedy to a First Amendment claim in *any* context.") (emphasis in original); *Reichle v. Howards*, 132 S. Ct. 2088, 2093, n.4 (2012) ("We have never held that *Bivens* extends to First Amendment claims."). Indeed, *Turkmen* leaves no doubt that recognizing a "free exercise claim would require extending *Bivens* to a new context"—

"a move [the panel] decline[d] to make absent guidance from the Supreme Court." 789 F.3d at 237. In so concluding, the panel explicitly reversed the holding of the district court. *See Turkmen v. Ashcroft*, 915 F. Supp. 2d 314, 352 (E.D.N.Y. 2013) ("*Bivens* should be extended to afford the plaintiffs a damages remedy if they prove the alleged violation of their free exercise rights.").

In supplemental briefing, Plaintiffs seek to distinguish *Turkmen* by arguing that its holding is limited to free exercise claims, not the panoply of other rights under the First Amendment. *See* Pls. Letter of July 14, 2015 at 1-2, Dkt. 97. To that end, Plaintiffs assert that their *Bivens* claim is grounded not merely in the Free Exercise Clause, but in several other First Amendment rights, including "the freedom of speech . . . and the closely-intertwined right of free association." *Id.* at 2.[11] Although Plaintiffs are no doubt correct that

[11] Although the First Amendment's text explicitly safeguards the freedom to speak and to worship ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . "), the Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Whether Plaintiffs' allegations sufficiently make out a First Amendment retaliation claim—under free exercise, speech, or association theories, *see* ¶¶ 200-01, 203—is an important question that the Court need not, and does not, reach in light of its conclusion that *Bivens* is unavailable in this context and the fact that the Agents have not raised the issue here. Indeed, the Agents do not argue that Plaintiffs fail to state a First Amendment claim because, for example, Plaintiffs' refusal to cooperate is not protected speech or protected associational

the *Turkmen* plaintiffs' First Amendment claim was limited to the Free Exercise Clause, they overlook the fact that *Turkmen* itself is unambiguously predicated on the understanding that the Supreme Court has never recognized a *Bivens* claim in the First Amendment context at all. *See* 789 F.3d at 236 (noting the Supreme Court has "'declined to extend *Bivens* to a claim sounding in the First Amendment'" (*quoting Iqbal*, 556 U.S. at 675). That understanding is sufficient to conclude that the relief Plaintiffs seek here requires extending *Bivens* to a new context, whether the right injured is freedom of speech, religion, or association. In other words, while *Turkmen* plainly forecloses a *Bivens* remedy for free exercise claims, the decision at a minimum also reiterates the Supreme Court's own pronouncements that *any* claim sounding in the First Amendment would require extending *Bivens* to a new context.[12]

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activity under the First Amendment, or that the Agents' alleged conduct could not infringe Plaintiffs' free exercise rights. Rather, their argument appears to be limited to the claim that "Plaintiffs fail to allege that each Agent defendant was a proximate cause of, or personally involved in, Plaintiffs' alleged inclusion on the No Fly List," Defs. Mem. at 39, and that "the alleged First Amendment rights at issue were not clearly established," *id.* at 51; *see also* Defs. Reply at 34-37. *But see Ayala v. Harden*, No. 1:12-CV-00281-AWI, 2012 WL 4981269, at *2 (E.D. Cal. Oct. 17, 2012) (concluding in summary fashion that "[r]efusal to become an informant is not a protected First Amendment activity").

[12] Although Plaintiffs cannot be faulted for pointing to a sentence in the Supreme Court's decision in *Hartman* suggesting the availability of a *Bivens* remedy in the anti-retaliation context, *see* Pls. Mem. at 39-40, the Court has resolved any ambiguity created by *Hartman* in subsequent decisions by at least twice reiterating that it has never recognized a *Bivens* claim in the First Amendment context. *See Iqbal*, 556 U.S. at 675 ("[W]e have declined to extend

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Bivens to a claim sounding in the First Amendment."); *Reichle*, 132 S. Ct. at 2093 n.4 ("We have never held that *Bivens* extends to First Amendment claims.")

The Supreme Court granted certiorari in *Hartman* to determine whether plaintiffs in retaliatory-prosecution suits bear the burden of showing a lack of probable cause. *See* 547 U.S. at 255-56. At the time, the D.C. Circuit, from where *Hartman* emerged, had long recognized a *Bivens* action in the First Amendment context, *see, e.g.*, *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (*Bivens* available for false arrest of Vietnam War protestors on U.S. Capitol steps), and specifically for retaliatory prosecution, *see, e.g.*, *Haynesworth v. Miller*, 820 F.2d 1245, 1274 (D.C. Cir. 1987). The petitioners in *Hartman* did not seek review—nor did the Supreme Court grant review—on the predicate question of whether *Bivens* was available for First Amendment retaliation. It was against that background that Justice Souter, in an introductory paragraph of his opinion, observed that "[w]hen the vengeful [prosecutor] is [a] federal [officer], he is subject to an action for damages on the authority of *Bivens*," and cited *Bivens* without further analysis. *Id.* at 256.

But in light of *Hartman*'s posture—and the careful consideration that the Supreme Court has given to the availability of *Bivens* in each context where it has recognized *Bivens*' availability—that single sentence simply cannot bear the weight Plaintiffs would put on it. *Bivens*' availability "was not at issue" in *Hartman*, "the point . . . was not then fully argued," and the Court "did not canvas the considerations" it invariably does in such cases. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013). As such, *Hartman* is better read as assuming—not deciding—the question of *Bivens*' availability in the First Amendment retaliation context. *See, e.g.*, *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (observing eight years after *Hartman* was decided that "we have several times assumed without deciding that *Bivens* extends to First Amendment claims"). Indeed, *Iqbal* explicitly noted that "[t]he legal issue decided in *Hartman* concerned the elements a plaintiff 'must plead and prove in order to win' a First Amendment retaliation claim." *Iqbal*, 556 U.S. at 673 (*quoting Hartman*, 547 U.S. at 257 n.5). And while the Court has cited *Hartman* on five occasions—including significant discus-

Even assuming, however, that the right at issue did not place Plaintiffs' claims in a new context, the mechanism of injury in this case surely does. Although Plaintiffs argue that the FBI agents' use of the No Fly List to retaliate against them merely represents "a new tool [that] does not transform a familiar pattern of misconduct into a novel context for purposes of recognizing a *Bivens* claim," Pls. Mem. at 43, *Turkmen* makes plain that this view is mistaken. A distinct mechanism of injury—such as the extraordinary rendition alleged in *Arar*—can "present[] a new context for *Bivens*-based claims." *Turkmen*, 789 F.3d at 234.[13] Here, Plaintiffs

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sions in *Iqbal* and *Reichle*—not once has it suggested *Hartman* decided the availability of a *Bivens* remedy for First Amendment retaliation.

Plaintiffs also correctly note that the Second Circuit once described *Hartman* as "reiterat[ing] the general availability of a *Bivens* action to sue federal officials for First Amendment retaliation." *See M.E.S., Inc. v. Snell*, 712 F.3d 666, 675 (2d Cir. 2013). But even assuming that is a fair characterization of *Hartman*, *Snell* distinguished *Hartman* and declined to imply a *Bivens* remedy for alleged First Amendment retaliation, *id.*; no other decision of the Second Circuit has relied on *Snell* or *Hartman* for the proposition that *Bivens* is available for a First Amendment anti-retaliation claim; and the author of the *Snell* opinion was a member of the more recent *Turkmen* panel and agreed with the panel majority that "the Supreme Court [has] consistently declined to extend a *Bivens* remedy to a First Amendment claim in *any* context," 789 F.3d at 268 n.3 (Raggi, J., concurring in part and dissenting in part) (emphasis in original). As such, *Snell* offers Plaintiffs little support for the proposition that a *Bivens* claim already exists for anti-retaliation claims. The other out-of-circuit cases cited by Plaintiffs overread *Hartman* for the reasons discussed above. *See, e.g.*, *George v. Rehiel*, 738 F.3d 562, 585 n.24 (3d Cir. 2013).

[13] *Turkmen* emphasizes the right at issue *and* the mechanism of injury in determining whether a claim presents a new context.

cannot point to any case recognizing a *Bivens* remedy for a federal officer's retaliation against an individual by placing or maintaining that individual's name on the No Fly List or, more generally, any government watch list. Nor can Plaintiffs point to a case recognizing a *Bivens* action where the mechanism of injury was the imposition of a substantial burden on an individual's ability to travel. Thus, whether viewed through the lens of the rights injured or the mechanism of injury, Plaintiffs ask this Court to extend *Bivens* to a new context.

Given the current state of *Bivens* jurisprudence, the conclusion that Plaintiffs seek to extend *Bivens* to a new context could end the inquiry. Indeed, in *Turkmen*, the court declined to "extend[] *Bivens* to a new context . . . absent guidance from the Supreme Court," without undertaking any additional analysis of whether

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When confronted with a new *Bivens* context, a court must assess whether an alternative remedial scheme exists before recognizing a *Bivens* remedy. *Turkmen*, 789 F.3d at 234 (*citing Arar*, 585 F.3d. at 572). That inquiry ensures, among other things, that a court does not imply a remedy for an injury when an alternative scheme to remedy that injury already exists. A court need not consider alternative remedial schemes, however, where a claim arises in an existing context, since the determination of whether or not *Bivens* is available in that context—and whether an alternate remedial scheme is available—has already been made. *Id.* at 237 n.17. Taking these two rules together makes clear that a failure to also consider the injury in determining whether a claim presents a new context would short-circuit the *Bivens* analysis because it risks ignoring a remedial scheme addressing *that very injury*. Thus, the upshot of Plaintiffs' favored approach, which would appear to ignore the particular form of injury as nothing more than a "new tool," would be the expansion of *Bivens* based solely on the right at issue without regard for remedial schemes that may exist—a result plainly contrary to the Supreme Court's contemporary *Bivens* jurisprudence.

Bivens might be appropriate in that context. *Id.* at 237; *see also Iqbal*, 556 U.S. at 675 (observing that the Court's "reluctance [to extend *Bivens* since 1980] might well have disposed of respondent's First Amendment claim of religious discrimination"). That said, after concluding a given claim involves extending *Bivens* to a new context, a court should generally consider "(a) whether there is an alternative remedial scheme available to the plaintiff, and, even if there is not, (b) whether special factors counsel hesitation in creating a *Bivens* remedy." *Turkmen*, 789 F.3d at 234 (quotations omitted). The Court will do so here.

The existence of a system of administrative and judicial remedies for individuals who have been improperly included on the No Fly List—the precise mechanism of injury in this case—is sufficient to conclude that *Bivens* should not be extended to this context. Specifically, Congress has directed the TSA to "establish a timely and fair process for individuals identified [under the TSA's passenger prescreening function] to appeal to the [TSA] and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i). The TSA is also required to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." § 44903(j)(2)(C)(iii)(I). Congress also mandated that "[t]he Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the [TSA]," § 44926(a), and that the Secretary "shall

establish" procedures "to implement, coordinate, and execute the process" for redress, § 44926(b)(1). These legislative directives have resulted in the DHS TRIP program. *See* 49 C.F.R. § 1560.201 *et seq.* The TSA is also required to maintain records for individuals whose information has been corrected through its redress process. *See* §§ 44903(j)(2)(G)(ii), 44926(b)(2). Finally, Congress has provided for judicial review of orders pertaining "to security duties and powers designated to be carried out by" the TSA. § 46110(a). The bottom line, then, is that Congress has crafted a remedial scheme for individuals to challenge their inclusion on the No Fly List and to judicially appeal an adverse determination.[14]

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[14] In their official capacity claims, Plaintiffs argue that this scheme of judicial review is not exclusive and that they have recourse in this Court under the APA for their claims concerning "the constitutional 'adequacy' of No Fly List placement, redress, and removal procedures." Pls. Mem. at 25. Two courts of appeal have agreed with this argument, albeit in the context of the original TRIP regime, not the revised one. *See Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250 (9th Cir. 2008); *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012); *Arjmand v. U.S. Dep't of Homeland Sec.*, 745 F.3d 1300 (9th Cir. 2014); *Ege v. U.S. Dep't of Homeland Sec.*, 784 F.3d 791 (D.C. Cir. 2015). The Fourth Circuit has also adopted that reasoning in an unpublished opinion. *See Mohamed v. Holder*, No. 11-1924, slip op. at 4-6 (4th Cir. May 28, 2013). Were the official capacity claims to proceed and were this Court to accept Plaintiffs' argument, Plaintiffs would thus have a further remedial path that may be sufficient to preclude the availability of a *Bivens* remedy. *See, e.g.*, *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009) ("[T]he APA leaves no room for *Bivens* claims based on agency action or inaction."); *Sinclair v. Hawke*, 314 F.3d 934, 940 (8th Cir. 2003) ("[T]he existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a *Bivens* action."); *Miller v. U.S. Dep't of Agr. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("[T]he existence of a right to judicial review under

Plaintiffs respond that this remedial scheme does not provide for damages from the Agents personally and, "[a]s such, TRIP and § 46110 are incapable of providing remedies for the constitutional violations that the Special Agent Defendants committed." Pls. Mem. at 45. The remedies Congress has chosen to provide, however, "need not be perfectly congruent," *Minneci*, 132 S. Ct. at 625, and they need not even "provide complete relief," *Bush*, 462 U.S. at 388. Indeed, although there can be no dispute here that the scheme created by Congress does not provide relief in the form of compensatory or punitive damages from the Government or the Agents, "[i]t does not matter that the creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed." *Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106, 110 (2d Cir. 2005) (quotation marks and alterations omitted). "That a particular plaintiff might suffer 'unredressed' injuries were a court not to recognize a new type of *Bivens* action may be a hard truth but it is a truth nonetheless and one to which the Supreme Court has alerted potential litigants." *Aryai v. Forfeiture Support Associates*, 25 F. Supp. 3d 376, 395 (S.D.N.Y. 2012) (Preska, C.J.). The Court's jurisprudence instructs that the salient point, rather, is that Congress has provided "what *it* considers adequate" for the relevant injury. *Chilicky*, 487 U.S. at 431 (1988) (emphasis added).[15] "So long as the plaintiff[s]

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the APA is, alone, sufficient to preclude a federal employee from bringing a *Bivens* action.").

[15] Analysis at this stage "include[s] an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Chilicky*, 487 U.S. at 423. And as Plaintiffs' themselves concede, "[t]he legislative history of the No Fly List remedial scheme shows that Congress considered, and struck down, an amendment

ha[ve] an avenue for *some* redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69 (emphasis added). Indeed, it appears that the alternative remedial scheme here is far more comprehensive—and effective—than that available to the *Turkmen* plaintiffs. *Cf. Turkmen*, 915 F. Supp. 2d at 353.

Nor is it relevant that Congress may not have had constitutional violations of the sort alleged here—as opposed to administrative errors—in mind when crafting the administrative and judicial review scheme it did. *See* Pls. Mem. at 44. The Supreme Court has explicitly rejected the argument that a remedy is inadequate because claimants "merely received that to which they would have been entitled had there been no constitutional violation." *Chilicky*, 487 U.S. at 427. In both *Bush* and *Chilicky*, the Court rejected claims that a *Bivens* remedy was necessary because the statutory schemes did not provide for relief specifically intended

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that would create a civil remedy against the Government if, following the TRIP review process, the TSC decided not to remove the complainant from the No Fly List." Pls. Mem. at 47 n.3. *See* H.R. Rep. No. 108-724, pt. 5, at 270-71 (2004). Plaintiffs seek to sidestep this legislative history because it concerns "a remedy against the Government, not individual nominating agents." Pls. Mem. at 47 n.3. But nowhere has the Supreme Court suggested that courts should look only to whether Congress has considered the specific question of damages against federal officers in their personal capacity. Here, Plaintiffs agree that Congress considered the question of what remedies would be appropriate in the context of the No Fly List and specifically rejected the option of a civil remedy. "Congress's pronouncements in the relevant context [thus] signal that it would not support . . . a damages claim," *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012) (Wilkerson, J.), and reinforce the conclusion that a *Bivens* remedy is inappropriate here.

to compensate a constitutional violation (First Amendment retaliation and Due Process violations, respectively) as opposed to the denial of a statutory right. "In neither case . . . [did] the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme imply that the statute has provided 'no remedy' for the constitutional wrong at issue." *Id.* at 427-28 (emphasis in original). As Justice O'Connor explained in *Chilicky*, "the harm resulting from the alleged constitutional violation can in neither case be separated from the harm resulting from the denial of the statutory right." *Id.* at 428. The same is true here. The crux of Plaintiffs' injury is their improper inclusion on the No Fly List as a result of the Agents' alleged retaliation. And whether that injury resulted from administrative error, a constitutional violation, or both, the dispositive point is that Congress' remedial scheme addresses precisely that injury.

In concluding that the remedial scheme crafted by Congress forecloses the recognition of a *Bivens* action, the Court does not overlook the fact that Plaintiffs in their official capacity claims challenge the procedural adequacy of that scheme. This Court does not today consider whether the TRIP process is constitutionally or otherwise deficient. Because the official capacity claims are now stayed, the procedural adequacy of that scheme, including the TRIP process, is a question for another day. For purposes of assessing the viability of a *Bivens* claim, however, it is enough to recognize that an alternative remedial process is available. Indeed, Plaintiffs have availed themselves of that process and now have assurances from the Government that they are not presently on the No Fly List. That is more

than enough to conclude that the creation of a *Bivens* remedy is inappropriate in these circumstances.[16]

C. RFRA Does Not Provide for Damages Against The Agents

Plaintiffs also seek damages against the Agents pursuant to RFRA. Section 3 of that statute, which creates a private right of action and provides for judicial remedies to enforce that right, states, in pertinent part, that:

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. § 2000bb-1(c). The principal question that divides the parties here is the meaning of "appropriate relief." Specifically, does the notion of "appropriate relief" encompass money damages against government officials in their personal capacities?[17]

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[16] Because an alternative remedial scheme is available in this context, the Court need not proceed to the second stage of inquiry and consider the applicability of any additional special factors, including the parties' divergent arguments concerning the national security implications of recognizing a *Bivens* action in this context. *See* Defs. Mem. at 18-22; Pls. Mem. at 48-52.

[17] The parties also dispute whether federal officials in their personal capacities are included within RFRA's definition of "government" and thus amenable to suit under the statute at all. At least two courts appear to have concluded that RFRA applies to personal capacity claims against federal officials. *See United Elmaghraby v. Ashcroft*, No. 04-CV-1809 (JG), 2005 WL 2375202, at *30 n.27 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part and remanded sub nom.*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd and remanded sub nom.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Solomon v.*

"Statutory construction begins with the plain text and, if that text is unambiguous, it usually ends there as well." *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003). This is not the usual case, however, because the plain text of RFRA merely raises, rather than answers, the critical question. As the Supreme Court has recognized with respect to RFRA's companion statute, which includes identical language in this respect, the phrase "'appropriate relief' is open-ended and ambiguous about what types of relief it includes." *Sossamon v. Texas*, 131 S. Ct. 1651 (2011).[18] Indeed, "[f]ar from clearly identifying money damages, the word 'appropriate' is inherently context-dependent." *Id.* "In some

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Chin, No. 96-CIV-2619 (DC), 1997 WL 160643, at *5 (S.D.N.Y. Apr. 7, 1997). At least one other court, however, has expressed some doubts about such a conclusion, at least in the national security context. *See Lebron*, 670 F.3d at 557. This Court need not address the issue, however, in light of its conclusion that money damages are unavailable under RFRA because, even assuming the Agents may be sued in their personal capacities, Plaintiffs' RFRA claim against the Agents in their personal capacities here is limited to money damages. *See* Pls. Mem. at 49 n.24.

[18] When the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress' power under § 5 of the Fourteenth Amendment, *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what that right is."), Congress responded by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, pursuant to its Spending Clause and Commerce Clause authority. *See Sossamon*, 131 S. Ct. at 1656. "RLUIPA borrows important elements from RFRA . . . includ[ing] an express private cause of action that is taken from RFRA." *Id.* at 1656. For that reason, courts often apply "case law decided under RFRA to issues that arise under RLUIPA" and vice-versa. *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010).

contexts, 'appropriate relief' might include damages." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). But "another plausible reading is that 'appropriate relief' covers equitable relief but not damages." *Id.* While the Supreme Court has acknowledged the availability of injunctive relief under RFRA, *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425-30 (2006), neither the Supreme Court nor any of the thirteen courts of appeals has held that RFRA provides for money damages.[19] The question, then, remains: Does "appropriate relief" in the context of RFRA encompass such damages? The answer is no.

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[19] Three courts of appeals have held that RFRA does not provide for money damages against the United States (or its agents acting in their official capacities) on the basis that "appropriate relief" cannot include damages because the language does not amount to an unambiguous waiver of sovereign immunity. *See Webman*, 441 F.3d at 1026; *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir. 2012); *Davila v. Gladden*, 777 F.3d 1198, 1210 (11th Cir. 2015). Although the Second Circuit has not addressed the issue, Plaintiffs agree with that conclusion, *see* Pls. Mem. at 84, and instead bring this case focusing on the remaining gap in the RFRA jurisprudence: whether a damages action exists against federal officials in their personal capacities. Because these decisions (and *Sossamon*) are grounded in principles of sovereign immunity, they are of limited assistance in addressing the question of damages against those who "come to court as individuals," *Hafer*, 502 U.S. at 27. At most, they may counsel caution in concluding that the same term—even one as malleable as "appropriate relief"—can include damages as applied to one class of defendants but not another.

The Court has also considered the Agents' argument concerning *Washington v. Gonyea*, 731 F.3d 143 (2d Cir. 2013), which held that RLUIPA does not provide for damages against state officials in their

Although the statute's plain text is wanting in clarity, "[t]he purpose and history of the statute elucidate the meaning of this ambiguous phrase." *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1736 (2011) (Sotomayor, J., concurring); *see also King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan."). Indeed, Congress included detailed findings and an unambiguous statement of the law's purpose in the statute itself. Section 2 of RFRA, codified at § 2000bb(b), provides that:

> The purposes of this Act are—
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

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personal capacities. As the panel explained, RLUIPA "was enacted pursuant to Congress' spending power, *see* 42 U.S.C. § 2000cc-1(b)(1), which allows the imposition of conditions, such as individual liability, only on those parties actually receiving the state funds." *Id.* at 145. Because the parties receiving the federal funds were state prison institutions, not state prison officials, *Gonyea* concluded "as a matter of statutory interpretation and following the principle of constitutional avoidance" that RLUIPA did not create a personal capacity damages action. *Id.* at 146. RFRA, by contrast, "was authorized by the Necessary and Proper Clause." *Hankins v. Lyght*, 441 F.3d 96, 106 (2d Cir. 2006). As such, the doctrinal concerns underlying the conclusion in *Gonyea* do not assist here.

RFRA was enacted three years after the Supreme Court's watershed decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which, as the Act itself recounts, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." § 2000bb(a)(4). Prior to *Smith*, the Supreme Court had employed a balancing test that took into account whether the challenged state action imposed a substantial burden on the right to free exercise of religion, and if it did, whether that action was necessary to serve a compelling government interest. Applying this test, the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U.S. at 408-409. And applying a similar approach, the Court held in *Yoder* that Amish children could not be required by state law to remain in school until the age of 16 over the objection of their parents, who viewed such education "as an impermissible exposure of their children to a 'wordly' influence in conflict with their beliefs." 406 U.S. at 210-211, 234-236.

The plaintiffs in *Smith* were two individuals who had been fired from their jobs at a drug rehabilitation center because they had ingested peyote as part of a religious ceremony of the Native American Church, of which they were both members. 494 U.S. at 874. They were subsequently denied state unemployment benefits after being found ineligible because of their discharge for work-related "misconduct." *Id.* Citing Supreme Court precedent, including *Sherbert*, the Oregon Supreme Court concluded that "the state could not, consistent with the First Amendment, deny unemployment compensation to petitioners." *Smith v. Employment Div.*, 307 Or. 68, 71 (1988). The Supreme Court reversed.

In his opinion for the closely divided Court, Justice Scalia noted that its decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (quotation omitted). Indeed, *Smith* cautioned that "a private right to ignore generally applicable laws" would prove "a constitutional anomaly." *Id.* at 886. In so concluding, *Smith* distinguished the Court's earlier decisions in *Sherbert* and *Yoder*, confining the former to its facts, *see id.* at 884-85, and holding that the latter involved more than just the free exercise of religion, *see id.* at 881 (discussing "the Free Exercise Clause in conjunction with other constitutional protections," such as the right of parents to direct the education of their children). Notable for present purposes, *Smith* did not change the remedies available for a successful claim under the Free Exercise Clause. Indeed, it says nothing about remedies at all.

Congress responded to *Smith* by affording greater statutory protection than the Court in *Smith* had held the Constitution offered.[20] Specifically, it concluded

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[20] While some have spoken of RFRA "overturning" *Smith*, "a statute cannot either enlarge or contract the Constitution." *Mack v. O'Leary*, 80 F.3d 1175, 1181 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). That Congress would seek to create a new statutory right that exceeded constitutional baselines, however, is not remarkable. "Indeed, Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection." *Hankins*, 441 F.3d at 107 (quotation omitted). In that respect, one aspect of RFRA's test is significant. As noted in *City of Boerne*, "the Act imposes in every

that "the compelling interest test as set forth in prior Federal court rulings"—that is, in *Sherbert* and *Yoder*—offered "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." § 2000bb(a)(5). As a result, in enacting RFRA, Congress sought "to restore the compelling interest test as set forth" in those earlier cases. § 2000bb(b). The Act thus created a new statutory right beyond the constitutional baseline articulated in *Smith* by providing that:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

§ 2000bb-1. In order to ensure that this new statutory right (albeit one based in erstwhile constitutional doctrine) could be vindicated in the courts, Congress also created a private right of action in § 3 providing for "appropriate relief" against the Government.

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case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 521 U.S. at 535. "On this understanding of [the Supreme Court's] pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 n.3 (2014). As discussed below, however, that breadth did not include expanding the scope of remedies available as compared with those previously available for constitutional violations.

Plaintiffs, however, see something more ambitious in RFRA. In addition to restoring the *standard* by which free exercise claims were adjudicated, Plaintiffs appear to argue the language in § 3 demonstrates Congress' intent to expand the scope of *remedies* available where an individual's religious freedom is abridged. But as Judge Posner persuasively noted shortly after RFRA became law, since the statute "says very little about remedies . . . it is unlikely that Congress intended it to displace the existing remedial system for constitutional violations." *Mack v. O'Leary*, 80 F.3d 1175, 1181 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). Indeed, nothing in the Act's Congressional findings or statements of purpose says anything about changing the remedial scheme applicable to free exercise claims. And nothing on the face of the Act's substantive provisions outwardly suggests they do anything other than carry out the law's stated purpose—namely, restoring the compelling interest test as it existed before *Smith*. As noted in the discussion of official and personal capacity claims above, *see supra* 12-14, a *Bivens* action would have provided the only potential path for an individual seeking personal capacity damages from a federal official for violation of the Free Exercise Clause at the time of RFRA's enactment. And as also discussed at length above, the Supreme Court has never recognized a *Bivens* remedy for violations of the Free Exercise Clause. *See supra* at 17-20. As a consequence, to interpret RFRA's reference to "appropriate relief" as contemplating a remedy then unknown to the law is, at the least, a stretch. Rather, the plain language of the statute read in the light of its stated purpose suggests the law changed the standard applicable to free exercise

claims while retaining all remedies that were understood as "appropriate" for claims under the Free Exercise Clause—and nothing more.

The conclusion that RFRA did not displace the existing remedial scheme—whether by adding to or removing from it—is reinforced by the statute's legislative history. Indeed, both House and Senate committee reports, which are regarded as "the most authoritative and reliable materials of legislative history," *Disabled in Action of Metro. New York v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000), evidence concern about the potential misinterpretation of RFRA's impact on existing law. For example, the Senate Judiciary Committee's report states that "[a]lthough the purpose of this act is only to overturn the Supreme Court's decision in *Smith*, concerns have been raised that the act could have unintended consequences and unsettle other areas of the law." S. Rep. No. 103-111 ("S. Rep.") at 12; *see also* H.R. Rep. No. 103-88 ("H.R. Rep.") at 8 (including essentially identical language). In particular, the legislative history includes discussion of the bill's potential impact on abortion rights, the ability of religious organizations to participate in publicly funded social welfare and educational programs, and the availability of tax emptions for such organizations. *See* S. Rep. at 12; H.R. Rep. at 8. Thus, the Senate Judiciary Committee's report states that:

> To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's [*sic*] free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.

S. Rep. at 12; *see also* H.R. Rep. at 8 (including essentially identical language). In view of such an understanding—and against a backdrop where the Supreme Court has never recognized a *Bivens* remedy under the Free Exercise Clause, whether before or after *Smith*—it would seem strange indeed for Congress to have employed a phrase as ambiguous as "appropriate relief" to *create* such a remedy where one was not previously recognized.

The contrast between the language in RFRA's remedial provision and every other federal statute identified by Plaintiffs as recognizing a personal capacity damages action against federal officers also points away from the conclusion they urge. Indeed, each of these four statutes includes specific reference to the availability of damages. Section 1985's remedial clause speaks of "an action for the recovery of damages." 42 U.S.C. § 1985. The Foreign Intelligence Surveillance Act permits "recover[y] . . . [of] actual damages . . . [and] punitive damages." 50 U.S.C. § 1810. The Telecommunication Acts provides that a court "may award damages." 47 U.S.C. § 605(e)(3). And although the Federal Wiretap Act provides for "appropriate relief," that term is specifically defined to include "damages . . . and punitive damages in appropriate cases." 18 U.S.C. § 2520(b). Because Congress knows how to create a personal capacity damages remedy (and because Plaintiffs have not pointed to a single statute where "appropriate relief" was interpreted to include such a remedy without an explicit definition to that effect), one might reasonably ex-

pect such language if Congress in fact intended to depart from the pre-*Smith* world in such a significant way.[21]

Nonetheless, Plaintiffs contend that Congress's reference to "appropriate relief" in RFRA's private right of action triggers the "ordinary convention" recognized in *Franklin v. Gwinnett Cnty. Pub. Sch.*, whereby courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." 503 U.S. 60, 76, 66 (1992); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right

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[21] Plaintiffs correctly observe that 42 U.S.C. § 1983, although usually concerned with the activities of state officials, also provides for damages against a federal official in his personal capacity where "state and federal defendants conspire[] under color of state law to deprive plaintiff[s] of federally guaranteed rights." *See Kletschka v. Driver*, 411 F.2d 436, 442, 448-49 (2d Cir. 1969). Even § 1983, however, is clear that appropriate relief under that statute includes "an action at law," which is to say, damages. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710-11 (1999).

Plaintiffs also note that Congress has sometimes specifically excluded damages from their definitions of "appropriate relief" and that "numerous" federal statutes specifically include injunctive and other equitable relief within their definitions of "appropriate relief." *See* Pls. Mem. at 83-84 (*citing* 5 U.S.C. § 702; 42 U.S.C. § 6395(e)(1); 15 U.S.C. § 797(b)(5); 16 U.S.C. § 973i(e); 2 U.S.C. § 437g(a)(6)(A); 8 U.S.C. § 1324a(f)(2); 12 U.S.C. § 1715z-4a(b); 15 U.S.C. § 6309(a)). None of these statutes, however, concerns the creation of a damages remedy against federal officers in their personal capacities and, as such, the value of Plaintiffs' analogy is diminished. In any event, the Supreme Court has "several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (collecting cases).

to sue for such invasion, federal courts may use any available remedy to make good the wrong done."). But whatever force of that rule in some contexts, it lacks any here. As noted in *Sossamon*, which interpreted this very statutory provision as borrowed in RFRA's companion statute,[22] *Franklin* required the Supreme Court to interpret the scope of an *implied* statutory right of action. "With no statutory text to interpret, the Court 'presume[d] the availability of all appropriate remedies unless Congress ha[d] expressly indicated otherwise.'" *Sossamon*, 131 S. Ct. at 1660 (*quoting Franklin*, 503 U.S. at 66); *accord Landgraf v. USI Film Products*, 511 U.S. 244, 285 n.38 (1994). That is not the case here, however, as Congress has created "an express private cause of action" that provides for "appropriate relief." *Sossamon*, 131 S. Ct. at 1656. The *Franklin* presumption is thus inapplicable, and the meaning of "appropriate relief" must be discerned using the traditional tools of statutory construction. Those tools, as noted above, point to the conclusion that Congress did not intend to create a *Bivens*-type action with the language of "appropriate relief."

Plaintiffs also seek support in *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338 (D.N.J. 2004), where the court determined that RFRA provides for personal capacity damages against federal officers. But that decision, and subsequent district court opinions adopting its reasoning,[23] rest on a crucial yet flawed premise—that

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[22] *See supra* note 18.

[23] *See Lepp v. Gonzales*, No. C-05-0566 (VRW), 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1039 (N.D. Cal. 2009), *as amended*, (June 18, 2009), *rev'd on other grounds*, 678 F.3d 748 (9th Cir. 2012);

"[c]ourts have *always* recognized § 1983 and *Bivens* claims for money damages against officials for violation of the Free Exercise Clause." *Id.* at 374 (emphasis added). Setting aside the § 1983 cases, which have no bearing on whether a claim exists under *Bivens*, there is no question—in light of *Iqbal*, *Reichle*, and, most recently, *Turkmen*—that the Supreme Court has never recognized a *Bivens* remedy for violations of the Free Exercise Clause. *See supra* at 17-21.[24] Indeed, before RFRA was enacted in 1993, the Supreme Court's

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[24] *Jama*'s (and Plaintiffs') sole citation to contrary authority is a single decision of the Sixth Circuit concerning a prisoner's free exercise claim. In that case, *Jihaad v. O'Brien*, 645 F.2d 556 (6th Cir. 1981), the court adopted the holding of an earlier panel extending *Bivens* to the First Amendment as a whole—not merely to Free Exercise Clause, *see id.* at 558 n.1. That prior panel's reasoning on this point was as follows: "We recognize that *Bivens* dealt with a Fourth Amendment violation, but its logic appears to us to be equally applicable to a First Amendment violation." *Yiamouyiannis v. Chem. Abstracts Serv.*, 521 F.2d 1392, 1393 (6th Cir. 1975). Although such reasoning may have seemed perfectly reasonable in 1975 (shortly after *Bivens* was decided), it has become untenable in the years after 1980, as cases such as *Turkmen* ably demonstrate. Indeed, the Sixth Circuit itself recently expressed doubts about the availability of *Bivens* in the free exercise context, notwithstanding its earlier holdings in *Yiamouyiannis* and *Jihaad*. *See Meeks v. Larsen*, No. 14-1381, ___ F. App'x. ___, 2015 WL 2056346, at *9 (6th Cir. May 5, 2015) (observing that "there is a dearth of precedent applying *Bivens* to free-exercise claims" and quoting the Eighth Circuit's conclusion that *Bivens*' availability in such contexts is "doubtful").

Plaintiffs also point to *Mack* for the proposition that at least one court of appeal has concluded that "appropriate relief" includes personal capacity damages. *See* Pls. Mem. at 85. But such reliance is difficult to justify because defendants there did not contest the availability of damages. As Judge Posner's opinion in that case ob-

only *Bivens* case in the First Amendment context came in the form of its refusal to recognize such an action in *Bush*—decided a full decade before RFRA became law.

In the end, "the fundamental task for the judge is to determine what Congress was trying to do in passing the law." R. Katzmann, *Judging Statutes* 31 (2014); *see also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (Hand, J.) ("[S]tatutes . . . should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.") As explained, Congress' intent in enacting RFRA could not be clearer: It was to restore Congress' understanding of the compelling interest test as it existed before *Smith*—no more, no less. And "[b]ecause Congress enacted RFRA to return to a pre-*Smith* world, a world in which damages were unavailable against the government, 'appropriate relief' is most naturally read to exclude damages against the govern-

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served, they "d[id] not question the propriety of damages as a remedy for violations of the Act, even though [RFRA] says nothing about remedies except that a person whose rights under the Act are violated 'may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate* relief against a government.'" 80 F.3d at 1177 (*citing* § 2000bb-1(c), emphasis added in *Mack*).

ment." *Webman*, 441 F.3d at 1028 (Tatel, J., concurring).[25] Plaintiffs' argument to the contrary thus fails.[26]

CONCLUSION

Although federal law imposes limits on the investigative tactics federal officials may employ in seeking to keep this nation safe, it also establishes limits on the manner in which an individual may vindicate his rights should those tactics cross the line. For the reasons stated, the law does not permit Plaintiffs to seek damages against the Agents in their personal capacities either under *Bivens* or RFRA. Accordingly, the Agents' motion to dismiss is GRANTED and the claims against FNU Tanzin, Sanya Garcia, Francisco Artusa, John

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[25] RFRA provides only for relief "against the government," which is defined to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1). As noted above, *see supra* note 17, the Court need not address the predicate question of whether "the government" includes federal officials sued in their personal capacity in light of its conclusion that "appropriate relief" does not encompass damages in any event.

[26] Plaintiffs' argument might carry more weight were the Supreme Court eventually to recognize a *Bivens* remedy in the First Amendment context. The Supreme Court has observed, in a related context, that "[t]he meaning of the word 'appropriate' permits its scope to expand to include . . . remedies that were not appropriate before . . . , but in light of legal change . . . are appropriate now." *West v. Gibson*, 527 U.S. 212, 218 (1999) (holding that Title VII's reference to "appropriate remedies" as passed in 1972 should be interpreted to include compensatory damages in light of subsequent legal developments in 1991). Thus, were the Supreme Court to recognize a *Bivens* remedy under the Free Exercise Clause, it might well be that "appropriate relief" under RFRA would be held to encompass personal capacity damages.

LNU, Michael Rutowski, William Gale, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, John Does 1-6 and 9-13 in their personal capacities are dismissed. The Court on its own motion also dismisses all personal capacity claims against John Does 7 and 8. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n.6 (2d Cir. 1990). As previously noted, this opinion does not address the viability of Plaintiffs' official capacity claims and thus expresses no opinion on the merits or their arguments concerning the manner in which individuals are added to the No Fly List or the mechanisms for challenging such inclusion. The parties are directed to submit a joint letter to the Court within 30 days advising how they wish to proceed with respect to those claims.

SO ORDERED.

Dated: Sept. 3, 2015
New York, New York

/s/ RONNIE ABRAMS
RONNIE ABRAMS
United States District Judge

APPENDIX D

UNITED STATES DISTTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 13-CV-6951 (RA)

MUHAMMAD TANVIR, JAMEEL ALGIBHAH,
AWAIS SAJJAD, AND NAVEED SHINWARI, PLAINTIFFS

v.

LORETTA E. LYNCH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., DEFENDANTS

Filed: Dec. 28, 2015

ORDER

RONNIE ABRAMS, United States District Judge:

On September 3, 2015, the Court issued an Opinion and Order dismissing Plaintiffs' individual capacity claims against Defendants FNU Tanzin, Sanya Garcia, Francisco Artusa, John LNU, Michael Rutkowski, William Gale, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, and John Does 1-13. *See* Dkt. 104. The Opinion also directed the parties to advise the Court as to how they wish to proceed with respect to Plaintiffs' official capacity claims against Defendants. *See id.* at 36.

On October 5, 2015, the parties submitted a joint letter in which they agreed "that Plaintiffs' official capacity claims for relief against Defendants should be dismissed

without prejudice and entry of final judgment is appropriate." Dkt. 105. The letter indicated that the parties would submit a proposed order and judgment to the Court.

On December 18, 2015, the parties informed the Court that they would not agree to the language in a proposed order. *See* Dkt. 108. The parties submitted two proposed orders for the Court's review, one drafted by Plaintiffs and one drafted by Defendants. The only significant difference between them is that Plaintiffs' proposed order recites what Plaintiffs describe as "basic procedural facts that led to the dismissal." *Id.* at 1. Plaintiffs seek to have "these facts be set forth in a judicially-issued document." *Id.* at 2. Plaintiffs also "advise the Court that, while they do not presently intend to seek attorneys' fees and costs, they do not wish to rule out the possibility of any such application entirely at this time." *Id.*

Defendants contend that Plaintiffs' proposed order "goes substantially beyond the terms agreed to by the parties" in their October 5 letter and that there is no need to include the additional information in that proposed order because "the chronology that Plaintiffs assert led to their withdrawing their claims will now be a matter of public record by virtue of [the December 18 letter]." *Id.* Defendants also argue that Plaintiffs "seek to transform an on-consent voluntary dismissal of their claims into a document intended to support a potential [attorneys'] fee application. *Id.* at 3. The parties do not appear to dispute that Defendants' proposed order "accurately reflects the terms that Plaintiffs outlined to the Court in their October 5, 2015 letter." *Id.*

The Court agrees with Defendants that Plaintiffs' proposed order is unnecessarily overinclusive. To the extent members of the public seek information regarding why Plaintiffs agreed to voluntarily dismiss their official capacity claims without prejudice, they may review the December 18 letter and other filings made in this lawsuit. The Court currently takes no position regarding the viability of Plaintiffs' possible motion for attorneys' fees and costs.

Because the parties agree that Plaintiffs' official capacity claims against Defendants may be dismissed without prejudice, the Court so dismisses them. The Clerk of Court is respectfully directed to enter final judgment in favor of Defendants. Plaintiffs may have until January 29, 2016 to move for attorneys' fees and costs. If no motion is filed by that date, this action will be terminated on the docket.

SO ORDERED.

Dated: Dec. 28, 2015
New York, New York

/s/ RONNIE ABRAMS
RONNIE ABRAMS
United States District Judge

APPENDIX E

UNITED STATES DISTTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 13-CV-6951 (RA)

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, AWAIS SAJJAD, AND NAVEED SHINWARI, PLAINTIFFS

v.

LORETTA E. LYNCH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

Filed: Feb. 1, 2016

ORDER

RONNIE ABRAMS, United States District Judge:

On September 3, 2015, the Court dismissed Plaintiffs' individual capacity claims against Defendants FNU Tanzin, Sanya Garcia, Francisco Artusa, John LNU, Michael Rutkowski, William Gale, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, and John Does 1-13. *See* Dkt. 104. On December 28, 2015, the Court—on consent of the parties—dismissed without prejudice Plaintiffs' remaining official capacity claims. *See* Dkt. 109. The December 28 Order noted that unless Plaintiffs moved for attorneys' fees and costs by January 29, 2016, "this action will be terminated on the docket." *Id.* at 3. On January 29, 2016, Plaintiffs informed the Court that they "will not seek an award of fees and costs at this

stage or the litigation." Dkt. 110. The Clerk or Court is accordingly respectfully directed to enter final judgment in favor of Defendants and to terminate this action.

SO ORDERED.

Dated: Feb. 1, 2016
New York, New York

/s/ RONNIE ABRAMS
RONNIE ABRAMS
United States District Judge

APPENDIX F

1. 42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its

application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

2. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

3. 42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

4. 42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

5. 42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.